Gt. Brit. Courts.

The Eighth PART of the REPORTS OF Sir *Edward Coke*, Kt.

Chief Juſtice of the COMMON PLEAS:

OF

Divers Reſolutions and Judgments given on ſolemn Arguments, and with great Deliberation and Conference of the moſt Reverend Judges and Sages of the LAW, of Caſes in LAW, which were never reſolved or adjudged, before: And the Reaſons and Cauſes of the ſaid Reſolutions and Judgments.

Publiſhed in the Ninth Year of the Moſt High and Moſt Illuſtrious *JAMES* King of *England*, *France* and *Ireland*, and of *Scotland*, the 44th, the Fountain of all Piety and Juſtice, and the Life of the LAW.

With REFERENCES to all the BOOKS of the *COMMON LAW*, as well Ancient as Modern.

Nulli vendemus, nulli negabimus, aut differemus juſtitiam aut rectum.
Magna Charta, cap. 29.

Hoc præcipit ut pax ſacroſanctæ Eccleſiæ & Regni ſolide conſervetur & colatur in omnibus, & quod Juſtitia ſingulis, tam pauperibus quam divitibus, adminiſtretur, nulla habita perſonarum ratione.
Weſtmonaſt. 1. cap. 1.

In the *SAVOY*:

Printed by E. and R. NUTT, and R. GOSLING, (Aſſigns of *Edward Sayer*, Eſq;) for D. Browne, J. Walthoe, B. Lintot, R. Goſling, W. Mears, T. Ward, W. Innys, J. Osborn, J. Hooke, T. Woodward, F. Clay, T. Wooton, R. Williamſon, and A. Ward.

M.DCC.XXVII.

Deo, Patriæ, Tibi.

QUOD ſcripſi (ut noverit Lector eruditus) priorum mearum in nonullis Præfationum de Leum Angliæ, & antiquiate & excellentia, duas as produxit quæſtiones: An Hiſtoriographi in oc mihi conveniunt quod illis adeo confidenter ſſervi: 2. Cum tam crera facta ſit de Legibus ngliæ municipalibus retitio, quodnam ſit corus ſive textus Juris mucipalis & ubi deinde inenendum. Ad utraſque arum reſponſion' tanm reddere viſum eſt. imam qd' attinet, quanam libri & acta publica uæ ſunt & *vetuſtatis & ritatis veſtigia*) a me in æfationibus in tertiam in ſextam Commenta-

THAT *which I have written as you know (learned Reader) in ſome of my former Prefaces of the Antiquity and Excellency of our Laws of* England, *hath produced theſe two Queſtions: Firſt whether Hiſtoriographers do concur with that which there ſo conſtantly hath been affirmed: Secondly, ſeeing ſo great and ſo often Rehearſal is made of the Common Laws of* England, *what the Body or Text of the Common Law is, and conſequently where a Man may find it. To both which in the End I yielded to make Anſwer. For the Firſt: Albeit the Books and Records (which are* & vetuſtatis & veritatis veſtigia) *cited by me in the Prefaces to the Third*

and Sixth Parts of my Commentaries, are of that Authority that they need not the Aid of any Historian: Yet will I with a light Touch set down out of the consent of Story, some Proofs of the Antiquity, and from the censure of those Persons who in respect of their Profession (for they were Monks and Clergymen) may rather fall into a Jealousy of Reservedness than Flattery, somewhat of the Equity and Excellency of our Laws; and that it doth appear most plain in successive Authority in Story what I have positively affirmed out of Record, That the Grounds of our Common Laws at this Day were beyond the Memory or Register of any Beginning, and the same which the Norman *Conqueror then found within this Realm of* England.

Ex vita Abbatis sancti Albani.

The Laws that William *the Conqueror swore to observe, were* bonæ & approbatæ antiquæ regni leges, *that is, the Laws of this Kingdom were in the Beginning of the Conqueror's Reign good, approved, and ancient. And, that the People might the better observe their Duty, and the Conqueror his Oath, he caused* Twelve of the most Discreet and Wise Men

Ex lib. Monast. de Litchfield.

riorum meorum partem prolata, ejus fidei sunt & authoritatis, qd' Historiographi auxilio nequaquam opus est; leviori tamen ut dicam tactu, ex consentiente Historiarum suffragio de Antiquitate, & (censura eor', quos forsan non immerito (si spectes eorum ordinem) suspiceris potius de vitio reticendi quam blandiendi) de Æquitate & excellentia legum nostrar', nonnulla adjiciam argumenta; & qd' testimoniis Historiæ omnium superior' tempor' liquet hoc imprimis manifesto, quod positive ex monumentis affirmavi, principia nempe Legum nostrar' hodie municipalium tanto ævo inoluisse, quod nihil omnino illorum de origine ostendi potest; hæcque illa fuisse eadem quæ victor ille Normannus in hoc Angl' regno inveniebat. Leges, quas *Gulielmus* gentis nostr' subactor jurejurando se astrinxit observaturum, *fuerunt bonæ & approbatæ antiquæ regni Leges.* Et, quo rectius populus sua officia & Victor jurament' sanctius observarent, constituit, ut *de singulis totius Angl' comitatibus* 12, *viri sapientiores* coram se jurarent, qd' nec ad dextram nec ad sinistr' declinantes, hoc est, nec

præ-

prærogativæ blandientes, nec privilegia dilatantes, *Legum ſuarum ſanctitatem patefacerent, nil prætermittentes: Nil addentes, nil prævaricando mittentes:* Et *Aldredus* Archiepiſc' (qui corona Regis caput cinxit triumphali) & *Hugo* Londinenſis Epiſcop', *per præcept' Regis ſcripſerunt propriis manibus omnia quæ præd' Jurati dixerunt.* Et has (teſte *Ingulpho*) *Authenticas eſſe & perpetuas per totum regnum Angl' inviolabiliter tenendas ſub pœnis graviſſimis proclamavit.* Summam cujus, cum digeſſiſſet in Magn' (utloquimur) chartam, ſolum proculdubio & fundament' Leg' omnium poſterior', ſignaculo ſecuritatis & voto beavit æternitatis, hoc generali concludens edicto: *Hoc quoque præcipimus, ut omnes habent & teneant Legem* Edwardi *Regis in omnibus rebus:* Benignique ſui operis præluſtri hac ſua inſcrip' erexit frontiſpicium: Willielmus *Dei gratia Rex Anglorum, Dux Normannor', Omnib' hominib' ſuis Francis & Anglicis ſalutem. Statuimus imprimis ſuper omnia unum Deum per totum regn' noſtr' venerari, unam fidem Chriſti ſemper inviolatam cuſtodiri, pacem & concordiam, judicium & juſticiam* in every Shire throughout all *England, to be ſworn before himſelf, that, without ſwerving, either* ad dextr' *or* ſiniſtram, *That is, neither to flatter prerogative or extend Privilege,* they ſhould declare the Integrity of their Laws without concealing, adding, or in any Sort varying from the Truth. *And* Aldred *the Archbiſhop that had crown'd him, and* Hugh *the Biſhop of* London, by the King's Commandment wrote that which the ſaid Jurats had delivered: *And theſe (as ſaith* Ingulphus) by publick Proclamation, he declared to be Authentick, and, for ever, under grievous Puniſhment, to be inviolably obſerved. *The Sum of which, compoſed by him into a* Magna Charta, *(the Ground-work of all thoſe that after followed) he bleſſed with the Seal of Security, and wiſh of Eternity, cloſing it up with this general:* And we further command that all Men keep and obſerve duely the Laws of King *Edward: rearing up the Frontiſpiece of his gracious Work with his glorious Stile,* Will'mus Dei gratia Rex Anglorum, Dux Normanor' Omnibus hominibus ſuis Francis & Anglicis Salutem. Statuimus

Ex Ingulpho Abbate Crowlandenſe.

Ex libro Antiquarum legum.

Ex libro manuſcripto de legibus antiquis.

mus imprimis ſuper omnia unum Deum per totum regn' noſtr' venerari, unam fidem Chriſti ſemper inviolatam cuſtodiri, pacem & ſecuritatem & concordiam, judicium & Juſticiam inter Anglos & Normannos, Francos & Britones Walliæ & Cornubiæ, Pictos & Scotos Albaniæ, ſimiliter inter & Inſulanos, provincias & patrias quæ pertinent ad coronam & dignitatem, defenſion' & obſervation' & honorem regni noſt', & inter omnes nobis ſubjectos per univerſam Monarchiam regni Britaniæ firmiter & inviolabiliter obſervari.

Ex Mat. Par. monacho ſancti Albani.

W. Ruf. *that ſucceeded his Father, ſo exceeded himſelf in Miſrule and Oppreſſion, that there is left no Regiſter of his Goodneſs in this Kind, for in his Time* the Kingdom was oppreſſed with unjuſt Exactions, *and the Juſtice corrupted with evil Uſages, as appeareth by the great Charter of his ſucceeding Brother, King* Henry I. *who thereby took away* all the evil Cuſtoms wherewith the Kingdom of *England* was unjuſtly oppreſſed, and reſtored the Law of King *Edward*, (*ſuch Law as was in the Time of the holy Confeſſor*) with thoſe Amendments which his

Ex Rogero Hoveden. presbitero.

inter Anglos & Normannos, Francos & Britones, Walliæ & Cornubiæ, Pictos & Scotos Albaniæ, ſimiliter inter & Inſulanos, provincias & patrias, quæ pertinent ad coronam & dignitatem, defenſionem & obſervationem & honorem regni noſtri, & inter omnes nobis ſubjectos per univerſam Monarchiam regni Britaniæ firmiter & inviolabiliter obſervari. Patri qui ſucceſſit *Guilielmus Rufus*, rem male gubernando libertateſque omnes ſupprimendo ita ſe exceſſit, qd' virtutis ſuæ hujuſmodi ne reliquum omnino eſt veſtigium; ſub illo enim, *regnum oppreſſum erat injuſtis exactionibus*, juſticiaq; ipſa malis adulterabatur conſuetudinibus, ut plane conſtat ex Magna illa Charta ſuccedentis ſui fratris *Henrici* primi, qua penitus abrogavit *Omnes malas conſuetudines quib' regn' Angl' injuſte opprimebatur reſtauravit legem Regis* Edwardi, (hanc nimirum quæ ſancti illius Confeſſoris viguiſſet temporibus *cum illis emendationib' quib' pater eam emendavit cum conſilio Baronum ſuorum* Leges hæ a *Mat. Par.* (cujus hiſtoria hanc habet inſertam donationem) edo centur fore, *Libertates &*

Con

Consuetudines antiquæ, quæ floruerunt in regno tempore sancti Regis Edwardi. Hoc etiam testatur *Hoveden*, in hæc verba; *Rex* Henricus *primus omnes malas consuetudines & iniquas exactiones, quibus regnum Angl' injuste opprimebatur, abstulit, pacem firmam in toto regno suo posuit, & teneri præcepit legem Reg.* Edwardi, *omnibus in commune reddidit*, &c. Quod etiam *Florentius* monachus Wigorn' (qui vixit sub *Henrico* primo) in iisdem fere verbis demonstrat. Quin &, injusticia seculi superioris unde extorta fuit, & unde & quomodo emendata *Gulielmus* Monachus Malmesburiensis his neminit verbis. Henricus *nat' in Anglia & regie nat', &c. edicto statim per Angliam misso injustitias a fratre & Ranulpo institutas prohibuit, &c. aliquarum moderation' legum revocavit insolitam, sacramento suo & omnium Procerum ne luderentur corrobor', &c.* Rex *Stephan'*, qui in avunculi successit regnum, charta sua magna libertatum, *Baronibus & hominibus de Anglia*, confirmavit his verbis, *omnes Libertates & bonas leges quas* Henricus *Rex Angliæ avunculus meus eis dedit & concessit, & omnes bonas* Father added by the Advise of his Barons. *What these were* Mat. Par. *(who hath inserted the Charter in his Story) declareth to be* the ancient Liberties and Customs which flourished in this Kingdom in the Time of holy King *Edward. And herewith agreeth* Hoveden *in these Words:* King *Henry* I. took away all the evil Customs and unjust Exactions wherewith the Kingdom of *England* was unjustly oppressed: He setled an assured Peace in his whole Kingdom, and commanded the Law of K. *Edward* to be observed, he restor'd to all, &c. *The which, almost in the same Phrase,* Florentius *a Monk of* Worcester, *and living in the Reign of* Henry I. *observeth. And by whom the Injustice of the foregoing Age proceeded, and by whom and how redressed,* William *the Monk of* Malmesbury *delivereth in these Words: Henry* born in *England*, of kingly Birth, &c. by his Proclamation speedily sent thro' *England:* Restrained the Injustice brought in by his Brother, and *Ranulph*, &c. and abolished the unwonted Lenity of some Laws, giving Assurance by his own and

Ex Mat. Par.

Ex Roger Hoveden.

Ex Florentio monarch. Wigorn.

Ex Willielmo monacho Malmesbur.

all the Noblity's Oath, that they ſhould not be deluded, &c. *King* Stephen *that ſucceeded his Uncle, confirmeth in his great Charter of Liberties* to the Barons and Commons of *England in theſe Words*, All the Liberties and good Laws which *Henry* King of *England* my Uncle granted unto them: And I grant them all the good Laws and good Cuſtoms which they enjoyed in the Reign of King *Edward and was ſo jealous of Innovation, as* Roger Bacon *the learned Friar ſaith in his Book*, De impedimentis ſapientiæ: King *Stephen* forbad by publick Edict that no Man ſhould retain the Laws of *Italy* formerly brought into *England. The next to this Man was* Hen. 2. *who in another great Charter eſtabliſhed the former Laws in theſe Words. Henry* by the Grace of God King of *England*, Duke of *Normandy* and *Acquitain*, E. of *Anjou*, to all Earls, Barons, and his faithful Subjects of *France* and *England*, Greeting: Know ye that I, to the Honour of God and holy Church, and for the common Amendment of my whole Kingdom, have granted and

Ex libro legum Antiquarum.

Ex libro Rogeri Bacon de Impediment' ſapientiæ,

Ex libro leg' Antiquarum.

leges & bonas conſuetudines eis concedo quas habuerunt tempore reg. Edwardi: Curaque illi tanta imprimis fuit innovationi viam intercludendi, quod *Rogerus Bacon* Frater ille perquam eruditus, in libro ſuo *de impedimentis ſapientiæ*, dicit: *Rex quidem* Stephanus, *allatis Legibus Italiæ in Angliam, publico edicto prohibuit ne ab aliquo detinerentur.* Huic ſucceſſione proximus fuit *Henricus* ſecundus, qui alia Mag. Charta priores ſtabilivit Leges, in hæc verba: Henricus *Dei gratia Rex Angl', Dux Normanniæ & Aquitaniæ, Comes Andegaviæ, omnibus Comitibus, Baronibus, & fidelibus ſuis Francis & Angl' ſalutem. Sciatis me, ad honorem Dei & ſanctæ Eccleſiæ, & pro communi emendatione totius Regni mei conceſſiſſe & reddidiſſe, & charta mea confirmaſſe Deo & ſanctæ Eccleſiæ, & omnibus comitib' & Baron', & omnib' hominib' meis omnes conceſſiones & donationes, & Libertates & liberas conſuetudines quas Rex* Henr' *avus meus eis dedit & conceſſit. Similiter etiam omnes malas conſuetudines quas ipſe delevit & remiſit, ego remitto & deleri concedo pro me & haredibus meis.* Unde liquet eum in Chartam avi ſui

fore

fore relaturum, qua iniquas exactiones & consuetudines a regnante fratre institutas aboleviſſet, & antiquiores præſtantioresq; ſancti *Ed.* leges corroboraſſet. Nec minus antiquæ quari etiam teſtimonio conſtabunt nonnullæ civitatum noſtrarum conſuetudines: De Londino enim ait *Fitz-Stephen* monachus Cantuarienſis; *Prius condita eſt quam illa a* Remo & Romulo, (Romam intelligens) *unde & adhuc antiquis eiſdem utuntur Legibus communibus inſtitutis*, &. Paulo inferius perveniamus uſque ad tempora regis *Johannis* filii regis *Henrici* ſecundi. Hic anno decimo ſeptimo a ſuſcepto gubernaculo, duas illas conſtituit magnas Chartas, unam, quam dicimus, Magnam Chartam (ob rei potius momentum quam ob quantitatem) aliam vero, Chartam de Foreſta, quæ in hodiernum uſque extant diem: De quibus monachus ſancti *Albani*: *Quæ ex parte maxima Leges Antiquas & regni conſuetudines continebant.* Et non multo poſt inquit: *Capitula quoque Legum & Libertatem, quæ ibi Magnates confirmare querebant, partem in Charta Regis* Henrici *ſuperius ſcripta*

reſtored, and by my Charter confirmed to God and holy Church, and to all Earls and Barons, and to all my Subjects, all Grants and Donations, and Liberties and free Cuſtoms, which King *Henry* my Grandfather gave and granted unto them. And all thoſe evil Cuſtoms which he aboliſhed and remitted, I likewiſe do remit, and for me and my Heirs do agree ſhall be aboliſhed. *By which Words it appeareth, that he had Reference to that Charter of his Grandfather that aboliſhed the unjuſt Exaction and Uſages of his Brother's Reign, and confirmed the old and excellent Laws under S.* Edward's *Government. And no leſs antient, even by the like Authorities will appear the Cuſtoms of ſome of our Cities: For of* London *ſaith* Fitzſtephen *(a Monk of* Canterbury) it was built before that of *Remus* and *Romulus* (*meaning* Rome) wherefore even to this Day they uſe the ſame antient Laws, publick Ordinances, &c. *Let us deſcend a little Lower to the Times of King* John, *the Son of* Henry *the Second, in the 17th Year of his Reign, made the two great Charters, the one called* Mag. Char. (*not*

Ex Stephanide monacho Cant'.

in

in respect of the Quantity, but of the Weight) *and the other* Charta de Foresta, *which are yet extant to this Day. Of which the Monk of St.* Albans *saith*, Quæ ex parte maxima leges antiquas & regni consuetudines continebant: *That is, which for the most Part did contain the ancient Laws and Customs of this Realm. And soon after he saith:* And those Laws and Liberties which the Nobility of the Realm did there seek to confirm, are partly in the aboveſaid Charter of King *Henry*, and partly taken out of the antient Laws of King *Edward: Not that King* Edward *the Confessor did institute them, but that he* out of the huge heap of the Laws, *&c.* chose the best and reduced them into one, *as in the Preface to the third Part of my Reports more at large it appeareth. The said great Charters made by King* John *are set down* in hæc verba *in* Mat. Par. pag. 246. *and in Effect do agree with* Magna Charta *and* Charta de Foresta *established and confirmed by the great Charter made in* 9 Hen. 3. *which for their Excellency have since that Time been confirmed and commanded to be*

Mat. Par. an. Dom. 1215. p. 246, 247.

Mat. Par. pag. 246, Mag. Char. 9 H. 3.

sunt, partimque Legibus Regis Edwardi *antiquis excerpta:* Non equidem quod has instituisse putes Regem *Edwardum*, sed quod *ex immensa Legum congerie, &c. optima quæque selegit, ac in unam coegit*; ut in tertiæ partis Relationum mearum Præfatione copiose magis videre est. Quas quidem Magnas Chartas Regis *Johannis in hæc verba* habet *Mat. Par. p.* 246. & eædem plane sunt cum Mag' illa Charta & Charta de Foresta, quæ stabiliuntur firmæque redduntur in Magna Charta, anno nono *Henrici* tertii sancita: Quarum tanta est excellentia, quod diversorum exinde parliamentor' prudentia & authoritas ultra trigesies illas approbaverunt & executioni mandaverunt. In *Registro* præterea, Leges istæ in Rescriptis quamplurimis dicuntur *Libertates*; ubi dicitur, *juxta tenorem Mag. Char. de Libertatibus Angliæ*, ab effectu, *quia liberos faciunt:* Quas *Mat. Par.* & alii (ut patet supra) sub eodem habent nomine. Jam tandem, non solum ex Historiographis, quibus idem ac nobis in religione suadetur, sed ex hisce etiam monasticis, Legum nostrarum municipalium

cipalium excellentia & antiquas eluceant perſpicue. Hoc illi meis in prioribus Præfationibus aſſertioni fuſius ſubtexui, ut earum unita vis facilius utrinque adimat opinionum diſcrepantiam de veritate clariſſimis adeo multis firmiſſimiſq; argument' (in ſuprad' tertiæ partis proœmio, immo & teſtimonio *Johannis Forteſcue*, militis aurati (qui, regnante *Henrico* ſexto, e ſupremo Angliæ tribunali jus dixit) inter alia prolato in Præfatione ſextæ mearum Relationum partis) demonſtrata. Quæ omnia evincunt manifeſto Leg' municipalium corpus ante devictam hanc Nation' inſcript' non fuiſſe in fragmentis illis edictorum atque Conſtitutionum promulgatis ſub titulo Legum Regis *Alvredi*, *Edwardi* primi, *Edwardi* ſecundi, *Ethelſtani*, *Edmundi*, *Edgari*, *Ethelredi*, *Canuti*, *Edwardi* Confeſſoris, aliorumve regum Angliæ, gente hac nondum ſubjugata: Quin &, illa adhuc reliqua Legum perpauca capitula, majore ex parte ſunt Edicta quædam & Conſtitutiones, ab iiſdem regibus, ex aſſenſu Comitiorum regni, ſeparatim ſancita. De Præſtantia

put in Execution by the Wiſdom and Authority of Thirty ſeveral Parliaments and above. And theſe Laws are in the Regiſter *in many Writs called* Liberties, *for there it is ſaid*, according to the Tenor of the great Charter of the Liberties of *England*, *ſo called of the Effect*, becauſe they make free: *And* Mat. of Par. *and others (as it appeareth before) ſtileth them by the ſame Name. So as the Antiquity and Excellency of our Common Laws do not only appear by Hiſtorians of our own Perſuaſion in Religion, but by theſe monaſtical Writers: The which I have added the more at large in this Point to that which I affirmed in my former Prefaces, to the End that they agreeing together, may the better perſuade both Parties to agree to the Truth manifeſtly proved by many unanſwerable Arguments in the ſaid Preface to the Third Part, and by the Authority of Sir* John Forteſcue, *Chief Juſtice in the Reign of King* Hen. 6. *amongſt others at large cited in my Preface to the 6th Part, by all which it is manifeſt, that in Effect, the very Body of the Common Laws before the Conqueſt are omitted out of the Fragments of ſuch Acts and*

Or-

Ordinances as are publiſhed under the Title of the Laws of King Alvred, Edward *the Firſt*, Edward *the Second*, Ethelſtane, Edward, Edgar, Etheldred, Canutus, Edward *the Confeſſor, or of other Kings of* England *before the Conqueſt. And thoſe few Chapters of Laws yet remaining, are for the moſt Part certain Acts and Ordinances eſtabliſhed by the ſaid ſeveral Kings by aſſent of the Common Council of their Kingdom. As for the Excellency of our municipal Laws I will add to that which hath been ſaid before, that the Monk of* Crowland *calleth them* the moſt juſt Laws, *and* Mat. *of Weſtm' of them ſaith:* They being by the Appointment of King *Knute* tranſlated out of *Engliſh* into *Latin*, were by him for their Equity commanded to be obſerv'd as well in *Denmark*, as in *England. And of this Matter thus much ſhall ſuffice.*

Ex Monacho Crowlandiæ. Ex Mat. Weſtm.

But yet before I take my leave of theſe Hiſtorians, I muſt incounter ſome of them in two main Points.

Firſt, that the Trial by Juries of 12 *Men (which is one of the invincible Arguments of the Antiquity of the Common Laws, being only appropriated to them) was not inſtituted by the powerful*

Legum noſtrarum communium, hoc adjiciam quod *Monachus Crowlandenſis* illas nequaquam immerito appellavit *Leges æquiſſimas*: Et de illis ait *Matth. Weſtmonaſterienſis*: *Jubente Cnutone ab Anglica lingua in Latinam tranſlatæ, tam in Dacia quam in Anglia propter eorum æquitatem a Rege præfato obſervari jubentur.* Atque de hac re hæc ſufficiant.

Miſſos tandem faciamus Hiſtoricos, ſi in duobus magni ponderis & momenti illis prius occurramus.

Primo, morem experiundi cauſas per duodecim viros juratos (qui firmiſſimorum unum eſt argumentor' Antiquitatis Legum Communium, ut his ſolis proprius) potentiſ

Sub-

bjugatores ex arbitrio
fuiſſe introductum ut
rum nonnulli audacter
iis affirmarunt.

Secundo, Curiam Acti-
um Communium inſti-
am non fuiſſe poſt ſta-
tum Magnæ Chartæ (an-
o nono *Henrici* tertii ſan-
tum) hoc quod opinioni
orundam aliorum peni-
s adverſatur. Ad pri-
um quod attinet, conſu-
at Lector doctus procemi-
um in tertiam Relationum
earum partem, ubi ha-
eat in quo hac de re edo-
tus ſatis acquieſcat: Inte-
ea tamen magni illius
ſuo genere) hujus regni
rnamenti attexam ſen-
entiam in elaborata ejus
Britannia, pag. 109. qua
clauſam habes hanc rem.
*Quod vero Polidorus Virgi-
lius ſcribit, Gulielmum illum
uctorem duodecim virorum
judicium primum induxiſſe,
nihil a vero alienius; mul-
is enim ante annis in uſu
fuiſſe certiſſimum eſt ex Legi-
bus Etheldredi: Nec eſt cur
terribile judicium vocaret, e
populo enim duodecim viri
liberi & legales e vicinia rite
vocantur; hi jurejurando
obligantur vere de facto ſen-
entiam dicere; advocatos
coram Tribunali utrinque
aſſerentes, & teſtes audiunt;
inde, acceptis utriuſque par-
is inſtrumentis, concludun-*

Will of a Conqueror, as ſome of them peremptorily affirm they were.

The 2d, that the Court of Common Pleas was not erected after the Statute of Magna Charta *(which was made in the ninth Year of King* Hen. 3.*) contrary to that which others do hold. For the firſt, I refer the learned Reader to the Preface before the third Part of my Reports, where he ſhall receive full and clear Satisfaction herein, and will only add the Judgment of the great Ornament (in his kind) of this Kingdom in his* Britannia, pag. 109. *with which I will conclude this Point:* But whereas Polidore Virgil *writeth*, that *William* the Conqueror firſt brought in the Trial by twelve Men, there is nothing more untrue, for it is moſt certain and apparent by the Laws of *Ethelbred*, that it was in uſe many Years before: Neither hath he any cauſe to term it a terrible Judgment; for Free-born and lawful Men, are duly by order impannelled and called forth of the Neighbourhood, theſe are bound by Oath to pronounce and deliver up their Verdict touching the Fact; they hear

Camb. Brit. p. 109.

hear the Council plead on both Sides before the Bench or Tribunal, and the Depositions of Witnesses; then taking with 'em the Evidences of both Parties, they are shut up together and kept from Meat, Drink and Fire, (unless Peradventure some one of them be in Danger of Death) until they be agreed of the Matter in Fact: Which when they have pronounced before the Judge, he according to Law giveth Sentence. For this manner of Trial our most wise and provident Ancestors thought the best to find out the Truth, to avoid Corruption, and to cut off all Partiality and Affections. *And for the Excellency and Indifferency of this kind of Trial, and why it is only appropriated to the Common Laws of* England, *read Justice* Fortescue, ca. 25, 26, 27, 28, 29, 30, 31, 32. &c. *which being worthy to be written in Letters of Gold for the the Weight and Worthiness thereof, I will not abridge any Part of the same, but refer the learned Reader to the Fountain it self.*

Fortescue.

As to the Second, it is clearer than the Light at Noon Day, that the Court of

tur, sine cibo, potu, & igne detinentur (nisi forte periculum sit ne ex illis quispiam moriatur) donec de facto inter se convenerint, quod ubi coram Judice pronunciaverint, ille de Jure sententiam profert. Hanc enim rationem prudentissimi Majores nostri optimam esse ad veritatem eliciendam, tum ad corruptelas evitandas, & affectus intercludendos existimarunt. Et modus hic ervendi veritatem (præstantissimus omnino, planeq; æquissimus) qua de causa juri municipali Angliæ peculiaris est, discas evoluendo hæc quæ scripsit Justiciarius *Fortescue, cap.* 25, 26, 27, 28, 29, 30, 31, 32, *&c.* Quæ cum, ut literis effingerentur aureis, optime promerverunt (si vel gravitatem vel excellentiam spectemus) nullam inde partem a me habes abstractam, proptera quod fontes ipsos petat velim Lector eruditus.

Secundo loco, luce ipsa meridiana apparet clarius Curiam Communium placitorum

citorum originem neutiquam habuiſſe poſt ſtatutum, 9 *Hen.* 3. *Cap.* 11. *Communia placita non ſequantur Curiam noſtram, ſed teneantur in aliquo loco certo.* Primo eodem ipſo tempore, eademque Charta, capite decimo tertio, Curia Actionum communium expreſſim nominatur: *Aſſiſæ de ultima præſentatione ſemper capiantur coram Juſticiariis de Banco, & ibi terminentur:* Et dubium nemini eſt quin Juſticiarii de Banco ſint Communium Action' Juſticiarii, Secundo, Rex *Henricus* primus, filius Victoris, Chartam Abbati de B. fecit confirmation' omnium ſuarum conſuetudinum, &c. & ulterius ei conceſſit cognitionem Actionum omnium quarumcunque, adeo ut neutrius Banci, ſive Aſſiſar', Juſticiariis liceret interponere authoritatem ſuam: Et hoc perſpicuum eſt ex 26 *Aſſ. pl.* 24. Tertio, in 6 *E.* 3. *fol.* 54, 55. conſtat, 15 Michaelis anno ſexto regis *Richardi* primi, finem fuiſſe levatum (ut loquitur) inter Abbatem de S. & *Theoband C.* de jure Patronatus Eccleſiæ de Preſton, coram Archiep' Cantuarienſis, Epiſcop' Roffenſi; & aliis Juſticiariis

Common Pleas was not erected after the Statute of 9 *H.* 3. cap. 11. Common Pleas ſhall not follow our Court, but ſhall be holden in ſome Place certain. *Firſt, at the ſame Time, and in the ſame great Charter, and in the next Chapter ſaving one, the Court of Common Pleas is expreſly nam'd;* Aſſiſes of Darrein Preſentment ſhall always be taken before the Juſtices of the Bench, *and no Man doubteth but* Juſticiarii de Banco *are Juſtices of the Common Pleas.* 2. *K.* Henry *the Firſt, the Son of the Conqueror, by his Charter, granted to the Abbot of* B. *a Charter of Confirmation of all his Uſages,* &c. *And further granted, that he ſhould have Conuſance of all manner of Pleas, ſo that the Juſtices of the one Bench, or of the other, or Juſtices of Aſſiſe, ſhould not meddle,* &c. *and this Charter appeareth in* 26 lib. Aſſ. pl. 24. 3. *In the Book Caſe of* 6 Ed. 3. fol. 54, 55. *it appeareth, that* 15 Mich. *in the ſixth Year of King* Richard *the Firſt, a Fine was levied between the Abbot of* S. *and* Theoband C. *of the Advowſon of the Church of* Preſton, *before the Archbiſhop of* Canterbury, *the Biſhop of* Rocheſter, *and others,*

26 lib. Aſſi. pl. 24.
6 E. 3. 54, 55.
15 Mich, 6 Ri. primi.

Pl. Com. in Stowel's Case.

Ex. rot. Pat. de anno 1 H. 3. 10 E. 4. f. 53.

others, (Justices del Banke, *that is, of the Court of Common Pleas.) And it appeareth in Master* Plowden's Com. in Stowel's Case, *that Fines were levied before the Conquest. In the Treasury there are yet remaining some Fragments of Records and Judgments in the Reign of King* Richard *the First, as well* coram Justiciarriis de Banco, *as* coram Rege. Martin de Pateshull was made Justiciarius de Banco, in the first Year of H. 3. *which was before the Statute of* Magna Charta. *And* in anno 10 Ed. 4. fol. 53. *all the Judges of* England *did affirm, that the Chancery, King's Bench, Common Pleas, and Exchequer, be all the Kings Courts, and have been Time out of Memory of Man; so as no Man knoweth which of them is the most Antient. But in a Case so clear this shall suffice. And yet let me observe, that divers Bishops and other Ecclesiastical Persons in antient Time, did studiously read over the Laws of* England, *and thereby attained to great and perfect Knowledge of the same. And the said* Martin de Pateshull *who was, as before is said, Chief Justice of the Court of Common Pleas in the first Year of*

de Banco, id est, de Curia placitorum sive actionum communium. Quin & in Commentar' magist' *Plowden* in casu *Stowell*, fines fuisse levatos, nondum hoc regno subjugato, manifestum est. In archivo etiamnum hodie extant fragmenta nonnulla Actorum publicorum adq; Judiciorum sub Rege *Richardo* primo, tam *coram Justiciariis de Banco*, quam *coram Rege. Martinus de Pateshull constitutus erat Justiciarius de Banco, anno primo regis* H. *tertii*, nondum adhuc edito statuto Magnæ Chartæ. Et in an. decimo *Edwardi quarti, f.* 53. omnes totius Angliæ Judices, Cancellariam, Bancum Regium, Bancum Communem, & Scaccarium, esse Regis fora affirmabunt, sicque ex omni ætatum memoria extitisse adeo ut dicitur nemo sciat hoc est eorum antiquissimum. In hac vero perspicua veritate hæc nobis sufficiant. Hic tamen observem Episcopos olim quam plurimos, alios q; viros Ecclesiasticos, studio Legum municipalium Angl' cupide invigilasse, plenamque inde uberioremq; adeptos fuisse cognitionem: Idem enim *Martinus de Pateshull* Capitalis de Banco Justiciarius

ciarius anno primo Regis *Henrici* tertii (ut ſupra memoratur) Decanus item fuit Eccleſiæ Sancti *Pauli*: De quo dicitur; *vir fuit ſummæ prudentiæ, & in legibus hujus regni peritiſſimus.* Et *Johannes Britton* Epiſcopus Herefordenſis, optime ſub Rege *Edwardo* 1. ſcripſit de municipalibus Angliæ Legibus, cujus hodie habemus opera. Multi etiam Magnatum, in Legibus Angl' periti imprimis evaſerunt, utputa (qd' unum inſtar multor' habeas, ne hæc egrediatur ſuos fines præfatio,) *Ranulphus de Meſchives*, clarus ille & illuſtris Comes Ceſtriæ, ejuſque familiæ tertius & poſtremus (vir niſi, me meus fallat Author, ſumma ſcientia & perita hujus regni Legum ſingulari) de eiſdem librum compoſuit, qui ſuam in illis cognition' abunde ſatis teſtatur: De quo *M. Par. p.* 350. memiſit (effect' ejus doctrinæ Legumque hujus reg' prudentiæ certiſſimum:) *Solus autem Comes Ceſtrenſis* Ranulphus *ſtetit viriliter, nolens terram ſuam redigere in ſervitutem (i. decimas ſolvere Domino Papæ) nec permiſit de feodo ſuo viros religioſos vel Clericos decimas memoratas ſolvere, quamvis Anglia & Wallia, Scotia*

King Henry *the Third, was alſo Dean of* Paul's, *of whom it is ſaid that he was* a Man of great Wiſdom, and exceeding well learn'd in the Laws of this Land. *And* John Britton *Biſhop of* Hereford, *wrote an excellent Work in the Days of King* Edward *the Firſt, of the common Laws of* England, *which remain to this Day. And many Noblemen have been excellently learned in the Laws of* England, *as taking one Example for many, leaſt this Preface ſhould grow too large,* Ranulpus de Meſchives *the great and worthy Earl of* Cheſter, *and the third and laſt of that Family, (having as mine Author ſaith) great Knowledge and Underſtanding in the Laws of this Land, compiled a Book of the ſame Laws, as a Witneſs of his great Skill therein: Of whom* Mat. Par. p. 350. *reporteth (as an Effect of his Learning and Knowledge in the Laws of this Realm:)* But *Ranulph* Earl of *Cheſter* alone valiantly reſiſted, as not willing to bring his Country into Servitude (by paying of Tenths to the Pope:) And would not ſuffer the Religious or Clerks of his Fee to pay the ſaid Tenths, altho' all *England* and *Wales, Scot-*

Joh. Britton Epiſcopus Heref.

Mat. Par. p. 350.

land and *Ireland*, were compelled to pay them. *And at a Parliament holden in the twentieth Year of King* Henry *the Third, the Act ſaith:* All the Biſhops deſired the Lords that they would Conſent, That all ſuch as were born afore Matrimony ſhould be Legitimate as well as they that be born within Matrimony, as to the Succeſſion of Inheritance, foraſmuch as the Church accepeth ſuch for Legitimate: And all the Earls and Barons with one Voice anſwered, That they would not change the Laws of this Realm, which hitherto have been uſed and approved. *Which uniform and reſolute anſwer of all the Nobility of* England, nullo contradicente, *doth ſhew the inward and affectionate Love and Reverenee they bear unto the Common Laws of their dear Country. The certain and continual Practice of the Common Laws of* England, *ſoon after the Conqueſt, even in the Time of King* Henry *the Firſt, the Conqueror's Son (which almoſt was within the Smoak of that fiery Conqueſt) and continued ever ſince, do plainly demonſtrate that thoſe Laws were before the Days of* William *the*

St. Merton, c. 9.

& Hibernia, ad ſolutionem compellarentur. Et ad Comitium Parliamentarium anno Regis *Henrici* tertii viceſimo, Actus ſic ſe habet: *Rogaverunt omnes Epiſcopi Magnantes ut conſentirent, qd' nati ante matrimon' eſſent legitimi, ſicut illi qui nati ſunt poſt matrimon' quantum ad ſucceſſionem hereditariam, quia Eccleſia tales habet pro legitimis: Et omnes Comites & Barones una voce reſponderunt, quod noluerunt Leges Angliæ mutare quæ hucuſque uſitatæ ſunt & approbatæ.* Fixa cujuſmodi & uniformis omnium Angliæ Magnatum reſponſio, *nullo contradicente*, interiorem eorum zelum & reverentiam, quæ medullitus (ſi dicam) in Patriæ ſuæ chariſſimæ Leges communes haberent, patefecit. Certa quidem & continua tam inde a devicta hac natione in municipalibus Angliæ Legibus praxis regnante ipſius victoris filio *Henrico* primo (cum flagrantis illius ſubjugationis vix adhuc evanuiſſet fumus) & abinde hucuſque deducta, illas ante ingreſſum Victoris *Gulielmi* in uſu fuiſſe evincit manifeſte. Nequaquam enim foret poſſibile, talem Leges attigiſſe perfectionem ſub ſuccedente *Henrico* ſecundo,

cundo, qualem tunc habuiſſent, ſi a Victore adeo nuperrime introductæ vel inſtitutæ fuiſſent. De quibus Legibus hoc confidenter ſtatuam, Nullam eſſe Legem (humanam dico) in toto hoc terrarum orbe, qua cum honore, pace, & concordia res in hoc regno agantur publicæ, infinitis prorſus gradibus, æque commode atque his antiquiſſimis ac præſtantiſſimis Angliæ Legibus.

Ranulphus de Glanvilla, Juſticiarius capitalis ſub *Henrico* ſecundo, Legum Angliæ partem doctiſſime pariter atque conſultiſſime literis commendavit (cujus opera in hodiernum uſque diem ſuperſunt) ejuſdemq; tractatus procœmio ſcribit, Regem hanc gentem gubernaſſe *Legibus regni & conſuetudinibus de ratione introductis & diu obtentis:* Er quibus verbis, adeo multis abhinc ſeculis, emiſſis, manifeſtum eſt, qd' tunc fuerunt leges regni & conſuetudines ratione fundatæ & antiquis temporibus acquiſitæ; quæ proculdubio nec potuit nec aſſerere voluit, ſi adeo recenter & fere immediate ante per Expugnatorem

Conqueror. For it had not been poſſible to have brought the Laws to ſuch a Perfection as they were in the Reign of K. Hen. 2. *ſucceeding, if the ſame had been ſo ſuddenly brought in or inſtituted by the Conqueror: Of which Laws this I will ſay, That there is no human Law within the Circuit of the whole World, by infinite Degrees, ſo apt and profitable for the honourable, peaceable, and proſperous Government of this Kingdom, as theſe antient and excellent Laws of* England *be.*

Ranulphus de Glanvilla, *Chief Juſtice, in the Reign of King* Henry *the Second, learnedly and profoundly wrote of Part of the Laws of* England *(whoſe Works remain extant at this Day:) And in his Preface he writeth, That the King did govern this Realm* by the Laws of the Kingdom, and by Cuſtoms founded upon Reaſon, and of antient Time obtained. *By which Words ſpoken ſo many Hundred Years ſince, it appeareth, that then there were Laws and Cuſtoms of this Kingdom grounded upon Reaſon, and of antient Time obtained, which he neither could nor would have affirmed, if they had been ſo recently and almoſt preſently*

before that Time instituted by the Conqueror. And in Token of my Thankfulness to that worthy Judge, whom I cite many Times in these Reports, (as I have done in my former) for the Fruit, which I confess my self to have reaped out of the fair Fields of his Labours, I will, for the Honour of him, and of his Name and Posterity, which remain to this Day (as I have good Cause to know) impart and publish both to all future and succeeding Ages which I have found of great Antiquity, and of undoubted Verity; the original whereof remaineth with me at this Day, and followeth in these Words. Ranulphus de Glanvilla Justiciarius Angliæ, fundator fuit domus de Butteley in Com' Suff. quæ fundata erat anno Regis *H.* filii imperatricis 17, & anno Dom. 1171. quo anno *Tho. Becket* Cantuar' Archiepiscopus erat occisus. Et dictus *Ranulphus* nascebatur in villa de Stratford in Com' Suff. & habuit manerium de Benhall cum toto Domino ex dono dicti regis *H.* Et duxit in uxorem quandam *Bertam* filiam Domini *Theobaldi de Valeymz* senioris, Dom' de Parham, qui *Theobald'* per chartam suam dedit dicto *Ran'* & *Bertæ* uxori suæ

He did bear Azure, a Chief indented, Or: Which Coat-Armour the *Pastons* of Norf. do Quarter at this Day.

Justitiarius Angliæ.

Fundator prioratus de Butteley.

Donum Reg'.

Uxor ejus.

fuissent institutæ. Et ne reverendissimo illi Judici videar ingratus (cujus testimonium hisce meis lucubrationibus (sicut alias) sæpe a me habes prolatum) pro fructu quem ex pulcherrimis ejus operum arvis me collegisse confiteor, in honorem ejus, & nominis, & sobolis hodie florentis (sicut optima mihi cognoscendi est occasio) in secula futura emittere & in medium proferre visum est, quæ magnæ fore vetustatis & exploratæ veritatis sæpissime sum expertus: Quorum origio apud me est, & hisce verbis sequuntur. Ranulphus de Glanvillæ *Justitiar' Angl', fundator fuit domus de Butteley in comitat. Suffol' quæ fundata erat an. Reg'* Henrici *filii Imperatricis decimo septimo, & an' Dom'* 1171. *quo an'* Tho. Becket *Cantuarienſis Archiepisc' erat occisus. Et dictus* Ranulph' *nascebatur in villa de Stratford in comitatu Suffol' & habuit manerium de Benhall cum toto Dominio ex dono dicti Reg'* Henrici: *Et duxit in uxorem quandam* Bertam *filiam Dom'* Theobaldi de Valeymz *senioris, Dom' de Parham*; *qui* Theobaldus *per Chartam suam dedit dicto* Ranulpho & Bertæ *uxori suæ totam terram de*

Bro-

Brochous cum pertinent', in
na domus de Butteley sita
, cum aliis terris & tene-
entis in libero maritagiô.
Prædictus vero Ranulphus
procreavit tres filias de dicta
Berta, viz. Matildam, A-
abiliam, & Helewisam,
uib' dedit terram suam an-
e progressum suum versus
erram sanctam. Matilda,
rima soror, habuit ex dono
atris sui totam villam de
Benhall, integraliter una
m advocatione Ecclesiæ sive
nasterii beatæ Mariæ de
Butteley, & nupsit cuidam
liti nomine Willielmo de
uberville, *de quibus pro-*
sit Hugo de Auberville:
e ipso Hugone Willielmus
Auberville: *De ipso*
illielmo *processit quædam*
hanna *filia unica & hæ-*
, quæ nupsit cuidam mili-
de Cancia nomine Nicho-
o Kyryell, *qui duxit in*
orem Margaretam *filiam*
m' Galfridi Peche; *&*
Nicholaus *vendidit Do-*
no Guydoni Ferr' *præd'*
nerium de Benhall: Et
m ille Nicholaus *de uxore*
genuit alium Dominum
icholaum *militem in Can-*
, qui vixit ante primam
ilentiam. Ipse autem
ido talliavit præd' maner'
Curia Dom' regis apud
Westmonastr' in crastini As-
sionis Dom', anno regni
gis Edwardi *filii* Edwar-

totam terram de Brochous cum pertin', in qua domus de Butteley sita est, cum aliis terris & tenementis in libero maritagio. Præd' vero *Ranulph'* procreavit tres filias de dicta *Berta*, viz. *Matildum*, *Amabiliam*, & *Helewisam*, quibus dedit terram suam ante progressum suum versus terram sanctam. *Matilda*, prima soror, habuit ex dono patris sui totam villam de Benhall integraliter una cum advocatione Ecclesiæ sive monasterii beatæ Mariæ de Butteley, & nupsit cuidam militi nomine *Will' de Auberville*, de quibus processit *Hugo de Auberville*, de ipso *Hugone Will' de Auberville*, de ipso *Willielmo* processit quædam *Johanna* filia unica & hæres, quæ nupsit cuidam militi de Cancia nomine *Nicholao Kyryell* qui duxit in uxorem *Margaretam* filiam Dom' *Galfridi Peche*; & ille *Nich'* vendidit Dom' *Guidoni Ferr'* præd' manerium de Benhall: Et tum ille *Nich'* de uxore sua genuit alium Dom' *Nich'* militem in Cancia, qui vixit ante primam pestilentiam. Ipse autem *Guido* talliavit præd' manur' in cur' Dom' Regis apud Westm' in crastin' Ascension' Dom', an' regni

Filiæ ejus.

Nuptiæ & donationes filiarum, & earum posteritas.

regni regis *E.* filii *E.* primo, ſibi & *Alianoræ* uxori ſuæ & hæredibus de ſe exeunt': Et ſi ipſe *Guido* ſine hærede decederet, rem' *Wil' de S. Quintino* & hæredibus. *Amabilia*, ſecunda ſoror, habuit ex dono patris ſui medietatem vill' de Bawdeſeia & medietat' vill' de Fynbergh. *Amabilia* præd' habuit virum nomine *Radulph' de Ardern*, de quo proceſſit *Tho. de Ardern* filius & hæres, De *Tho' Radul'* filius & hæres, qui feoffavit priorem & conventum de Butteley de medietate villæ de Bawdeſey. De præd' *Radulpho* proceſſit quidam *Tho. Ardern* filius & hæres. *Helewiſa*, tertia ſoror, habuit ex dono patris ſui aliam medietat' villæ de Bawdeſey præd', & aliam medietatem villæ de Fynbergh præd'. *Helewiſa* prædicta habuit virum nomine *Robertum* filium *Rob.* de quo proceſſit *Rad'* filius & hæres, qui feoffavit *Warinum de Inſula* de medietate prædicta villæ de Fynbergh. De *Rad'* proceſſit *Rob.* filius de hæres qui feoffavit *Ran'* fratrem ſuum de medietate prædict' villæ de Bawdeſey. Et nota, quod præfatus *Ranulph' de Glanvilla* fuit vir præclariſſimus genere, utpote de nobili

Vir præclariſſimus & de nobili ſanguine.

di *primo*, *ſibi* & Alianor *uxori ſuæ*, & *hæredibus* d *ſe exeunt'*: *Et ſi ipſe* Guid *ſine hærede diſcederet*, re Willielmo *de ſancto* Quin tino & *hæredibus*, Ama bilia, *ſecunda ſoror*, habu *ex dono Patris ſui* medieta *tem villæ de Bawdeſeia*, & *medietatem villæ de* Fy *bergh*: Amabilia *prædict habuit virum nomine* R nulphum de Ardern; *quo proceſſit* Tho. de Arde *filius & hæres*; *de* Thom Ranulphus *filius & hær qui feoffavit priorem & co ventum de Butteley de m dietate villæ de Bawdeſe De prædicto* Ranulpho *pr ceſſit quidam* Tho. Arde *filius & hæres*. Helewi *tertia ſoror*, *habuit ex do patris ſui aliam medietat villæ de Bawdeſey prædict & aliam medietatem vil de Fynbergh prædicta*: H lewiſa *prædict' habuit vir nomine* Robertum *filiu* Roberti, *de quo proce* Radulphus *filius & hær qui feoffavit* Warrinum Inſula *de medietate præd villæ de Fynbergh*. *De* R dulpho *proceſſit* Rober *filius & hæres*, *qui feoffa* Ran' *fratrem ſuum de m dietate prædicta villæ Bawdeſey*. *Et nota qu præfatus* Ranulph' de Gl villa *fuit vir præclariſſi genere*, *utpote de nobili ſ*

gui

guine, vir insuper strenuissimus corpore, qui provectiori etate ad terram sanctam properavit, & ibidem contra inimicos crucis Christi strenuissime usque ad necem demicavit. Fuit autem Berta ex illustri prosapia orta, filia Dom' Theobaldi Valeymz senioris, Dom' de Parham, quorum & Ranulp' & Bertæ consanguinei multi, de quibus plures milites, omnes vero gentiles & generosi, istam partem Suffolciæ eorum incolatu & generosa carnis propagine honorifice illustrabant annis multis.

Et *Henricus de Bracton*, Regi *Hen'* tertii temporibus, hujus regni Judex, capite primo Libri sui primi, numero tertio, inquit: *Ego* Hen. de Bracton *animum erexit ad vetera judicia justorum proscrutanda diligenter, non sine vigiliis & labore*, &c. adeo ut Leges Angliæ *vetera judicia justorum* ab illo nuncupantur. Author libri qui inscribitur *Fleta* (qui regnante *Edwardo* primo scripsit) in operis sui axordio idem sentit quod & *Glanvilla* de Angliæ Legum tum antiquitate tum honore; & ibidem, libr' quem scripsit cur distinxit appellatione *Fletæ* plenius tibi satisfaci-

sanguine, vir insup' strenuissimus corpore, qui provectiori ætate ad terram sanctam properavit, & ibidem contra inimicos crucis Christi strenuissime usque ad necem demicavit. Fuit autem *Berta* ex illustri prosapia orta, filia Dom' *Theobaldi Valeymz* senioris Dom' de Parham, quorum & *Ranulphi* & *Bertæ* consanguinei multi, de quibus plures milites, omnes vero gentiles & generosi, istam part' Suff. eor' incolatu & generosa carnis propagine honorifice illustrabant annis multis.

Vir strenuissimus. Vide Pl. com. f. 368. b. obiit apud Acres. Ad terram sanctam peregrinatus. Effusio sanguinis contra inimicos Christi. Prosapia uxoris Bertæ.

And Hen' de Bracton *a Judge of this Realm, in the Reign of King* Henry *the Third, in his first Chapter of his first Book*, Numero tertio, *saith: I* Henry de Bracton have set my Mind to search out diligently the ancient Judgments of the just, not without much Pains and Labour, &c. *So as he stileth the Laws of* England, *by the Name of* the ancient Judgments of the Just. *The Author of the Book called* Fleta *(who wrote in the Reign of King* Edward *the First) in his Preface to his Work agreeth with* Glanvill *concerning the Antiquity and Honour of the Laws of*

England, *and there ſheweth the Reaſon wherefore he intitled his Book by the Name of* Fleta: But this Treatiſe which may worthily be called *Fleta*, becauſe it was compiled, in the *Fleet*, of the Laws of *England. I have a* Regiſter *of our Writs original, written in the Reign of King* Henry *the Second, (in whoſe Time* Glanvill *wrote) containing the original Writs which were long before the Conqueſt, as in the ſaid Preface to the third Part appeareth, and yet alſo remaining in Force, ſuch excepted as have been inſtituted or altered by Acts of Parliament ſince that Time, which is the moſt antient Book yet extant of the Common Law, and ſo antient, as the Beginning whereof cannot be ſhewed.*

To the ſecond Queſtion I do affirm, That the Statutes of Magna Charta, Charta de Foreſta, Merton, Marlebridge, Weſtm' 1. De Bigamis, Glouc' Weſtm. 2. Articuli ſuper cartas, articuli Cleri, ſtatutum Eboraic', Prærogativa regis, *and ſome few others, that be antient, amongſt which, the Statute of* 25 Ed. 3. *is not to be omitted, touching Treaſons (which for the moſt Part are but Declarations of*

as: *Tractatus autem iſte, qui* Fleta *merito poterit appellari; qui in Fleta, de jure Anglorum, fuit compoſitus.* Reſcript' mihi eſt originalium *Regiſtrum*, ſub Rege Henricio ſecundo literis conſignatum quo (tempore ſcripſit *Glanvilla*) brevia ſive Reſcripta continens originalia, quæ multo ante ſubactam hanc nation' (prout conſtat in memorata illa tertiæ partis præfatione) in vigore extiterunt pleno ut & hodie exiſtunt; eis modo exceptis quæ in Comitiis Parliamentariis inſtituta aut immutata fuere, qui liber, omnium de lege municipali extantium, eſt vetuſtiſſimus, adeoq; antiquus ut de origine ejus nihil prorſus oſtendatur.

Ad ſecundam quæſtion' affirmo, quod ſtatuta, quæ inſcribuntur, *Mag' Chart', Charta de Foreſta, Merton, Marlebridge, Weſtm'* 1. *De Bigamis, Glouceſt' Weſtm', Articuli ſuper Chartas, Articuli Cleri, Statutum Eboraicum, Prerogativa Reg',* & antiqua alia nonnulla (inter quæ ſtatutum anno viceſimo quinto *Edwardi* tertii de crimine læſæ Majeſtatis ſancitum omittendum non eſt) pleriſq; quo-

rum

rum ſolummodo declaratur lex municipalis; una cum reſcriptis originalibus de actionibus ſive placitis (ut loquimur) communibus, quæ in *Regiſtro* comprehenduntur, cum & exquiſitæ & veræ indicandi crimina dilinquentium formulæ, ſunt corpus ipſum & quaſi textus legum Angliæ municipal': Cauſarumque & Judiciorum relatorum vetuſtiores libri olim editi, & monumenta ſeu acta publica, ab annis quadringentis & ultra in hunc uſque diem deducta & ſumma fide reſervata, ſunt Commentaria tantum, & ear' leg', reſcript' originalium, & indicandi formalarum expoſitiones. Et cum alias, tum præcipue ex duobus cauſis (altera, ſcil', *Jehu Webb*, altera *Blackamore*) jam prelo, ut & aliæ, commiſſis (vereque hoc fauſtiſſimo immo florentiſſimo Juſticiæ a Regia Majeſtate unicuique adminiſtratæ determinatis) patet clariſſime libros noſtros & monumenta, apta fore commentaria, & veras ſtatutorum decretorumq; comitialium explicationes. Et, ſi ſtudioſus Lector exemplum de reſcripto originali quæſi verit, caſum *Calye*, in termino Paſchæ 26 *Eliz.* Reginæ feliciſſimæ memo-

the Common Law) together with the original Writs contained in the Regiſter *concerning Common Pleas, and the exact and true Forms of Indictments and Judgments thereupon in criminal Cauſes, are the very Body, and as it were the very Text of the Common Laws of* England. *And our Year Books and Records yet extant for above theſe Four Hundred Years, are but Commentaries and Expoſitions of thoſe Laws, original Writs, Indictments and Judgments. By two Caſes, the one of* Jehu Webb, *and the other called* Blackamore's Caſe *now among others publiſhed and reſolved in this bleſſed and flouriſhing Spring-time of his Majeſty's Juſtice, ſpecially (among many others) it appeareth, that our Book Caſes and Records are alſo right Commentaries, and true Expoſitions of Statutes and Acts of Parliament. And for an Example of an original Writ, among many other, I refer the ſtudious Reader eſpecially to* Caly's Caſe *in* Paſch' 26. *of the Reign of the late Queen* Elizabeth *of ever bleſſed Memory, now publiſhed, whereby it more clearly appeareth how judicious the Opinion of Juſtice* Fitzh. *is in his Preface to his* N. B. *where he ſaith, that*

that original Writs are the Foundations whereupon the Law dependeth, and how truly he calleth them the Principles of the Law, and fortifieth alſo the Opinion of Bracton lib. 5. fol. 413. *where he ſaith, that* (Breve formatum eſt ad ſimilitud' regulæ juris) *which Caſe I have reported in that Form to this End, that Students ſeeing the ſingular Uſe of original Writs, will in the beginning of their Study learn them, or at leaſt the principalleſt of them without Book, whereby they ſhall attain unto three Things of no ſmall Moment: 1. to the right Underſtanding of their Books: 2. To the true Senſe and Judgment of Law: And laſtly, to the exquiſite Form and Manner of Pleading. And the Caſe of* Barretry *ſtandeth for an Example of an Indictment.*

riæ agitatum, & jam editum, conſulat, ex quo clare patet conſultam imprimis fuiſſe Judicis *Fitzherbert* opinionem judicioque latam optimo in proœmio Libri ſui de *Natura brevium*, ubi aſſerit Reſcripta originalia fundamenta eſſe, & totius Legis quaſi cardines; & quam recte ab eo Juris principia appellantur: Firmat etiam hic caſus illud quod ſentit *Bracton*, *lib.* 5. *fol.* 413. ubi dicit, *Breve formatum eſſe ad ſimilitudinem regulæ Juris.* Quem caſum in medium proferendo hunc mihi propoſui finem, quod uſum ſingularem brevium originalium ex hoc perſpicientes ſtudioſi, dum adhuc in hoc literarum genere tyrones ſunt, ea vel ſaltem eorum in uſu frequentiora, memoriter ediſcerent; quod ſi faciant ad hæc tria plurimi momenti facillime perveniant. Primo, rectius librorum apprehendant rationem: Secundo, ſenſum ſententiamque Juris genuinam felicius intelligant: Exquiſitam denique cauſas agendi formam aſſequantur. Et caſus de Barratria (ut loquimur) formulam indicandi crimina recte tibi demonſtrat.

Aſſiſa-

Aſſiſarum Actionumque realium intermiſſio, bina in Rempub. induxerunt mala, & tertiam (ſi modo non ſurrepſerit) ſequi veriſimile eſt. Primo litium multitudo in actionibus perſonalibus quibus liberi tenementi & juris hæreditarii realitas controverſa eſt, in ſubditi impenſam & vexationem minime tolerandas. Secundo, contentiones multiplices in uno eodemque caſu, adeo ut ſententiæ duodecim virorum juratorum (quas veredicta vocamus) diverſæ ſæpius feruntur ex utraque parte; nec tamen lis demum inter partes aliquatenus dirimitur, nec fixa alterutri ſeu pacifica manet poſſeſſio, utrinque licet frequentius exploretur pariter ac judicetur.

The neglect of Aſſiſes and real Actions hath produced two Inconveniencies in the Commonwealth, and a 3d is (if it be not ſtept on already) like to inſue: 1. *the Multitude of Suits in perſonal Actions, wherein the reality of Freehold and Inhetance is tried, to the intollerable Charge and Vexation of the Subject:* 2. *Multiplicity of Suits in one and the ſame Caſe, wherein oftentimes there are divers Verdicts on the one Side, and divers on the Other, and yet the Plaintiff or Defendant can come to no finite End, nor can hold the Poſſeſſion in quiet, though it be often tried and adjudged for either Party.*

Et hoc fit, dum recta Legum inſtitutio declinatur: Unde Lex municipalis dente carpitur maledico, & detrimenta reipublicæ eveniunt non ferenda. In actionibus perſonalibus de ære alieno, bonis, & catallis (ut dicimus) recuperatio vel barra (ut apud nos eſt) in una actione, barra eſt & in alia, & hujuſmodi litis finis eſt. In actionibus vero realibus de libero tenemento &

And this groweth, for that the right Inſtitution of the Law is not obſerved, to the unjuſt Slander of the Common Law, and to the intollerable Hindrance of the Commonwealth. In perſonal Actions concerning Debts, Goods and Chattels, a Recovery or Bar in one Action is a Bar in another, and there is an End of the Controverſy. In real Actions for Freehold and Inheritance, being of a higher and worthier

thier Nature, and ſtanding upon greater Variety of Titles and Difficulties in Law, there could not be above two Trials, or at the moſt (and that very rarely) three, and in the mean Time, after one Recovery, the Poſſeſſion reſteth quiet. 3. *The Diſcontinuance of real Actions will produce in the End, two dangerous Effects*, viz. *want of true Judgment in the Profeſſors of the Law, and groſs Ignorance in Clerks of the right Entries and Proceedings in thoſe Caſes. We ſee that Works of Nature are beſt preſerved from their own Beginnings, frames of Policy are beſt ſtrengthned from the ſame Ground they were firſt founded, and Juſtice is ever beſt adminiſtred when Laws be executed according to their true and genuine Inſtitution. And therefore to the End the antient and excellent Inſtitution of the Common Law might be recontinued for the good of the Commonwealth*, (for it is convenient for the Commonwealth, that there be an End of Controverſies.) *I have therefore reported two Caſes of* Aſſiſes, *for that the Writ of* Aſſiſe *(in Caſe where it lieth) is* optimum & maxime feſtinum remedium: *And the Caſes of* Buckmere *and* Syms *of*

hæreditate (quæ altioris prorſus ſunt naturæ & dignioris, & in quibus jura diſſimiliora decernuntur, ſubtilioreſq; agitantur in lege quæſtiones) ultra duas, vel tres (idque rariſſime) eſſe nequeant explorationes, & interim, una jam habita recuperatione, quiete agitur poſſeſſio. Tertio, actionum realium deſuetudo duo efficient periculoſa, videlicet, veri judicii in legum profeſſoribus defectum, & in Clericis, formularum rite intrandi, aptique in iiſdem caúſis proceſſus craſſam ignorantiam. Opera Naturæ ſuis a primordiis maxime præſervari perſpicimus, res politicæ ab iiſd' optime fundamentis muniuntur a quibus primo inſtituuntur, & Juſticia æquius ſemper adminiſtratur, quum Leges ſecund' veram & genuinam earum inſtitutionem executioni mandentur: Ideoque ut antiqua Legum municipalium & præclara inſtitutio, ad reipub' utilitatem retineatur *(expedit enim reipub', ut ſit finis litium)* duos in publicum protuli caſus de Aſſiſis, eo quod breve de Aſſiſa (in caſu quo habeatur) *optimum eſt & maxime feſtinum remedium:* Et caſus *Buckmere*, &

Syms

Syms de brevibus de Formedon (ut loquimur) in remanere: Et caſum *Edward Altham* de brevi de Dote recuperanda.

Et nos, quos regia Majeſtas publicos in hoc ſuo regno ſubſtituit Judices, moras omnes ſupervacaneas & indebitas, omneſque fictas & curioſas nimis in placitando agitationes (quoad poſſumus) penitus amputare ſtetuimus: Quæ, dum irrepſerunt, multum nuper in cauſa fuerunt quare actiones reales & præſertim de Aſſiſis brevia, ut quondam fuerint, non adeo ſunt frequetia.

Et quamv' in actionib' realib', ſicut cauſæ pondus ipſe exigit, longiora tempora in proceſſu, quam in actionibus perſonalib' concedantur, ſicut in libello Judicis *Forteſcue*, *cap.* 53. manifeſtum eſt (ubi apparet dilationes illas nec nimis longas eſſe, nec juſta eam niſi de cauſa admiſſas: *Crebro enim* (inquit ille) *in deliberationibus judicia matureſcunt, ſed in celerato proceſſu nunquam:*) Petens tamen tempore opportuno per has reales Actiones ad finem debitis pervenerit; ad quem per action' perſonalium proſecutionem de libero tenemento vel hæreditate

Writs of Formedon *in Remainder*: Edw. Altham's *Caſe of a Writ of Dower.*

And we, that are Judges of the Realm, have reſolved to cut off all ſuperfluous and unjuſt Delays, and as much as we can, all fained Dilatory and curious Pleadings: The Admittance whereof, of late Time, hath been a great Cauſe why real Actions, and ſpecially Writs of Aſſiſe, *have not been ſo frequent as they have been.*

And though in real Actions, as the Weight of the Cauſe requireth, there are longer Times given in the Proceeding, than in perſonal Actions, as appeareth in Juſtice Forteſcue's *Book cap.* 53. (*where it appeareth that thoſe Times are neither overlong, nor without juſt Cauſe*; for many Times in Deliberations, Judgments grow to ripeneſs, but in over haſty Proceſs never:) *Yet ſhall the Demandant come to a timely final End by theſe real Actions, which he ſhall never do by Proſecution of perſonal Actions for the Trial of Freehold or Inheritance. And they that well*

Forteſcue, cap. 53.

ob-

obſerve the three Parts of the Reports in the Reign of King Edward *the Third, ſhall find few or no Actions of Treſpaſs or perſonal Actions brought concerning any Lands or Tenements, but either where no Title of Freehold or Inheritance came in Queſtion, or where the Plaintiff could not have any real Action: And therefore amongſt many others it appeareth in an Action of Treſpaſs,* Quare clauſum fregit *brought by the Biſhop of* Coventry *and* Litchfield, *in* 6 Ed. fol. 44. b. *Exception was taken to the Replication of the Biſhop for that he pleaded in the Reality, for always in thoſe Days real Caſes were determined in real Actions, which made Judges in thoſe Times to Merit that honourable Teſtimony which* Thirning *Chief Juſtice attributeth to them in the* 12*th Year of the Reign of K.* H. 4. *that they were the greateſt Sages that ever were: And that in the Reign of K.* E. 3. *the Law was of the greateſt Perfection that ever it was; and that pleading (the greateſt Honour and Ornament of the Law) grew in the Reign of that King to that Excellency, as that the Pleading*

6 E. 3. fol. 34. b.

experiundo, nunquam poteſt. Tres autem Ralationum partes regnante *Ed.* 3. promulgatas qui penſitaverint, paucas aut omnino nullas tranſgreſſion', aliaſque perſonales action' de terris ſeu tenementis latas invenerint, niſi ubi nulla de libero tenemento aut jure hæreditario quæſtio oriebatur, aut ubi Petenti nulla realis Actio data fuit. Liquet igitur, cum alias tum præcipue ex actione quadam tranſgreſſionis, *Quare clauſum fregit*, per Epiſcopum Covent' & Litchfield' proſecuta in 6 *Edwardi* 3. *fol.* 34. *b.* ad Epiſcopi replicationem factam fuiſſe exceptionem, quod in realitate litem agitabat, ſemper enim, ut tunc ſe habuerunt tempora, caſus reales in actionibus realib' diſcuſſi fuerunt: Unde eorum temporum Judices præclarum illud meruere teſtimonium, qd' *Thirning*, Juſticiarius capitalis illis attribuit anno *Hen.* 4. 12. videl't, quod aliorum omn' longe fuer' conſultiſſimi ſimul & ſapientiſſimi; & quod ſub Reg' *Edw.* 3. majorem quam antea habuiſſet Lex perfectionem; & quod cauſarum in jure agitatio (ſummum legis decus & ornamen

mentum) ad eam in ejuſdem Regis Temporibus creviſſet excellentiam, ut ſuperiorum temporum agitationes, ſi ad illas ſub Rege *Edwardo* 3. comparentur, mancas quaſi & imbelles *Thirning* exiſtimarentur.

Magnum Ducatus Cornubiæ caſum variis de cauſis retuli. Primo, quamvis ille idem caſus olim (ut hæc mearum Relationum parte conſtare poterit) adjudicatus fuerit; de eodem tamen jamdudum queſtio nova exorta eſt, partim quod judicia inter alia Regis monumenta, paucis cognita, clauſa aſſervantur, & partim quod judiciorum ration' & cauſæ (ut legis mos eſt) in iiſdem non expreſſæ monumentis, nulli plene & integre ſatisfecerunt; præſertim vero, quod nulla de eorum determinationum ac judiciorum veris cauſis & rationibus facta fuerit & divulgata Relatio. Secundo, quod illi qui nullam inde habent partem, de vero poſſeſſionum hujus Ducatus ſtatu inſtituantur, eoque moneantur ne cum iis pactionem ineant qui poſſeſſiones inde aliquas emerunt aut adepti fuerunt: Et qd' iii qui ullam ejuſdem par-

in former Times having Regard to the Pleadings in the Reign of King Ed. 3. *are holden by* Thirning *to be but feeble.*

I have reported the great Caſe of the Dutchy of Cornwall *for divers Cauſes.* 1. *Altho' this very Caſe hath been long ſince (as ſhall appear in this Report) judicially adjudged, yet hath the ſame of late been called in Queſtion again, partly for that the ſaid Judgments remain privately amongſt the reſt of the King's Records, unknown but to a few, and partly, for that the Reaſons and Cauſes of the Judgments being (according to Law) not expreſſed in the Record itſelf, gave no full and clear Satisfaction: But principally for that there was no Report made and publiſhed of the true Cauſes and Reaſons of thoſe Reſolutions and Judgments.* 2. *To the End that ſuch as have not any Part thereof, may hereby be inſtructed of the true State of the Poſſeſſions of this Dutchy, and by this Means be admoniſhed how they deal with any that have bought or purchaſed any of theſe Poſſeſſions; and that ſuch as*

have

have acquired or gotten any of them, knowing that the Judgement was given in this Case, both upon many direct Authorities in the Point, and upon plain and demonstrative Reason (the two main Causes of true Satisfaction) may therewith rest satisfy'd. The last, but not the least, is, for that the most Noble and Excellent Prince, who is, omine, nomine, numine magnus, *and the greatest that ever was before him, hath in his first Cause* in hoc forensi dicendi genere *gotten Victory. I have for some Respects reported the same in Latin, wherein I have been contented,* potius scribere proprie quam Latine; *and for that the Words of Art which will bear no Translation, are herein so many and so frequent, I have added the Report thereof in the Vulgar Language, that the Reader may use either of them at his Pleasure. There are certain other Cases now published by me, concerning some of the most abstruse, dark and difficult Points in the Law, and yet very necessary to be known, as in* Arthur Blackamore's *Case concerning Amendments,* Beecher's *Case of a* Retraxit, *Departure in Despite of the Court, and of Fines and Amercements,*

tem acquisiverunt, aliove pacto nacti sunt, intelligentes sententiam in hoc causu latam fuisse cum ex quamplurimis directis admodum & luculentis Authoritatibus & indiciis, tum ex plena demonstrativaque ratione (duobus veris & præcipuis satisfaciendi causis) habeant quo acquiescant. Ultima hunc casum referendi causa (nequaquam tamen minima) est, quod termaximus ille & excellentissimus Princeps, qui *omine, nomine, numine magnus,* & omnium qui antecesserunt illustrissimus, in prima sua causa palmam *in hoc forensi dicendi genere* adeptus est. Nonnullæ mihi animum induxerunt rationes, ut Latine in scripta redigerem hunc casum, quod dum facerem, contentus fui *potius scribere proprie quam Latine,* & quia voces artis (in aliam se converti Linguam minime patientes) adeo multæ sunt & frequenter intercedentes, Lingua etiam assueta hæc loquitur Relatio; utraque igitur Lector pro animo suo utatur. Quosdam alios a me modo relatus habes casus de quæstionibus in Lege nonnullis abstrusissimis, difficilimis, & spinosissimis, intellectu

tellectu tamen valde neceſſariis, utputa caſum *Arthuri Blackamore* de amendationib', caſum *Beecher* de formula juris quam dicimus retraxit, de receſſu in contemptum Curiæ, & de mulctis (quas fines & amerciamenta vocamus) caſum *Grieſley* de amerciamentis afferendis, & nonnullos alios. Hos, de induſtria, tam perſpicue, luculenter, & ſummatim quam potui, perfeci: Leges enim plane ſunt diſſimiles illis Naturæ quæ *gratius per Chriſtallum aut ſuccinum pelluceant quam ſi nuda conſpiciantur*, nec pictis aſſimulentur tabulis quæ delicias tum afferunt maximas, quum recentibus adhuc & floridis poliantur coloribus, & umbris graphice inductis haud parum illuſtrantur & exornantur.

Greiſley's *Caſe of affearing of Amercements and ſome others. And I have of Purpoſe done theſe as plainly and clearly, and therewith as briefly as I could. For the Laws are not like to thoſe Things of Nature*, which ſhine much brighter thro' Chriſtal or Amber, than if they be beheld naked: *Nor like to Pictures that ever delight moſt when they are garniſhed and adorned with freſh and lively Colours, and are much ſet out and graced by artificial Shadows.*

Utrum res ipſa, ſive ætas mea provectior (anno jam ſexageſimo ætatis meæ propemodum acto) ſive aliud quicquam in cauſa eſt; labore magis, in hoc octavo opuſculo, quam ſuperiorum aliquibus, eniſum me fuiſſe pro certo ſcio: Deus tamen optimus maximus propitia ſua benignitate (dum in gravioribus reipublicæ negotiis verſatus

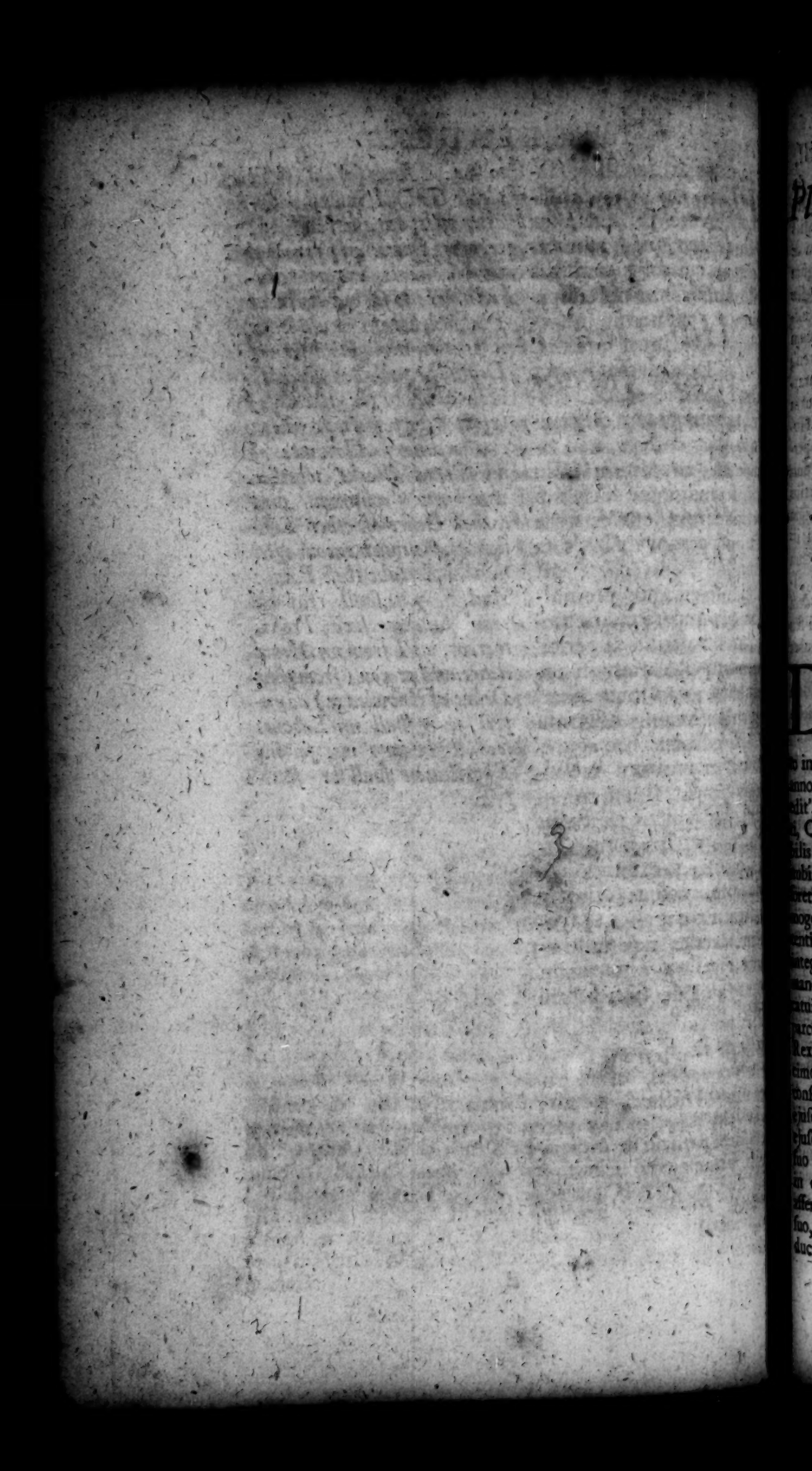
And whether it be in Reſpect of the Matter, or my Years growing faſt on, being now in the 60th Year of my Age, or for what other Reſpect ſoever it be, ſure I am, I have felt this Eighth Work much more painful than any of the other have been unto me. And yet hath Almighty God of his great Goodneſs (amidſt my publick Employments) enabled me hereunto. And as the Na-

turaliſts ſay, that there is no Kind of Bird or Fowl of the Wood or of the Plain that doth not bring ſomewhat to the building and garniſhing of the Eagle's Neſt, ſome, Cinnamon, and other Things of Price, and ſome, Juniper, and ſuch like of leſſer Value, every one according to their Quality, Power and Ability: So ought every Man, according to his Power, Place, and Capacity, to bring ſomewhat, not only to the Profit and adorning of our dear Country (our great Eagle's Neſt) but therein alſo, as much as ſuch mean Inſtruments can, to expreſs their inward Intention and Deſire, to honour the peaceable Days of his Majeſty's happy and bleſſed Government to all Poſterity. And for that I have been called to this Place of Judicature by his Majeſty's exceeding Grace and Favour, I hold it my Duty, having obſerved many Things concerning my Profeſſion, to publiſh amongſt others certain Caſes that have been adjudged and reſolved ſince his Majeſty's Reign, in his higheſt Courts of ordinary Juſtice, in this calm and flouriſhing Spring Time of his Majeſty's Juſtice, amonting with thoſe of my former Edition in all

fui) hoc ut perficerem vires dedit. Et, ut dicunt Naturaliſtæ, ſicut nulla ſylvarum aut camporum volatilium genera ſunt, quæ non aliquid afferunt ad nidum acquileum conſtruendum & adornandum nonnulla cinnamomum aliaque magni pretii & momenti, nonnulla juniperum & talia id genus minoris pretii, ſecundum illorum qualitatem, potentiam, & facultatem: Ita cuilibet, ſecundum poteſtat', ordinem, & mentis acumen, addendum eſt aliquid, non ſolum patriæ noſtræ chariſſimæ (aliquæ noſtræ nido potentiſſimæ) ut proſit & illuſtret, ſed in eo etiam pro virili, ut interiorem animi intentionem & affectum exprimat, ad Regiæ Majeſtatis dies pacificos, gubernationemque ejus feliciſſimam atque beatiſſimam in poſterum celebrandum. Ego vero, cum ſuæ Majeſtatis Gratia ad haud ſedem Judiciariam ſummo cum favore me evocarit, in officio meo me defuiſſe exiſtimavi, ſi non, dum multa mea in profeſſione obſervavi, in lucem ederem caſus nonnullos (inter alios) ſub Regia ſua Majeſtate in eminentiſſimis Juſtitiæ ordinariæ Curiis judicatos

judicatos & discussos, serenissimo hoc florentissimoque vere Justitiæ a sua Majestate pie administratæ; qui casus cum illis editionum mearum superiorum, numerum attingunt octa inta quatuor. Et (si Deo placeat) opus aliud posthac edere instituti; cujus quidem elementa tantum collegi, non tamen ut propositum mihi est, formavi, ne forsan si relinquerem qualecunque sit post meam ex hac vita emigrationem (qd' re pari accidisse vidimus) promulgaretur imperfectum. Singularis vestrum superior' mearum Relationum approbatio, continuis aliar' Lucubrationum associata votis, ad onus hoc aggrediendum multum me incitavit. Et, si non minorem vos vestris in studiis fructum ex his percepe-ritis, quam ego exanimo votis opto, vosque (scientiæ vestra ex cupiditate) speritis, faciles meæ mihi erunt vigiliæ, votis enim meis abunde satisfactum erit.

to 84. *And (if it shall please God) I intend hereafter to set out another Work, whereof I have only collected the Materials, but not reduced them to such a Form as I intend, lest if I should leave it as it is, it might, after my Death, be published (as hath been done in the like Case) before it be perfected. Your extraordinary Allowance of my former Works, together with your continual and earnest Desire of other Editions, have much encouraged me to undertake these Pains: And if you shall reap in your Studies such Profits thereby, as I from my Heart desire, and as you (from your Desire of Knowledge) do expect, then shall my Labours seem light unto me, for my Expectation shall be satisfy'd.*



Placita coram dom' Reg' nunc in Cancellar' ſua apud Weſtm' in Com' Midd', Termino Sancti Hill', anno regni dicti domini noſtri Jacobi dei gratia Angl', Scotiæ, Franciæ, & Hibern', Regis, fidei defenſor', &c. viz. Angliæ, Franciæ, & Hiberniæ, tertio, & Scotiæ triceſ. nono.

Caſus PRINCIPIS.

DOminus Rex nunc mand' breve ſuum clauſ. vic' Cornub' direct', in hæc verba. *Jacobus* Dei gratia Angliæ, Scotiæ, Franciæ, & Hiberniæ Rex, fidei defenſor, &c. vic' Cornub' ſalutem. Cum in ſtatuto in parliamento domini *Edwardi* nuper Regis Angliæ tertii, anno regni ſui undecimo, apud Weſtm' in com' Midd' tent', edit', inter alia, inactitat' fuit authoritate ejuſdem parliamenti, Quod primogenitus filius regis angl' qui foret hæreditabilis regno angliæ, foret dux Cornub', & quod ducat' Cornubiæ foret ſemper extunc primogenit' fil' reg' angliæ, qui foret proximus hæres prædicto regno. Et quod præd' primogenit' filius regum angliæ haberet & gauderet erga manutentionem & ſupportationem ſtatus ſui principalis, totum & integrum ducat' Cornub', ac omnia caſtr', Honor', dominia, maneria, terr', ten', & omnia alia hæreditament' dicto ducatui ſpectan' vel pertin', vel reputat' vel capt' fore pars, parcell', vel membr' ejuſdem ducat'. Cumq; idem nuper Rex *Edward'* tertius, in præd' parliam'to ann' regni ſui undecimo ſupradict', per quandam cart' ſuam de co'i aſſenſu, & conſilio Prælator', Comit', Baronum, & alior' de conſilio ejuſdem regis, in dict' parliam'to convocat', ac authoritate ejuſdem parliam'ti, dederit *Edw.* tunc Comiti Ceſtriæ, filio ſuo primogenito nomen & honor' ducis Cornub', ipſumq; in ducem Cornub' præfecit. Et per Cartam illam de co'i aſſenſu & conſilio prædict', dedit & conceſſit eidem filio ſuo, nomine ducatus prædicti & ſub nomine & honore ducis dicti loci, inter alia, Caſtrum de Wallingford cum

Hamlet' & membris ſuis, ac annuam firmam villæ de Wallingford, cum honoribus de Wallingford & de ſancto Walerico, cum pertinentiis, in comitatu Oxon' & aliis comitatibus ubicunque Honores illi fuerint: Habendum & tenendum eidem duci, & ipſius & hæredum ſuorum regum angliæ fil' primogenit' & dicti loci ducibus in regno angliæ hæreditar' ſucceſſur', una cum feod' militum, Advocac' Eccleſiarum, Abbatiarum, Priorat', Hoſpital', Capellar', & cum hundred', piſcar', foreſtis, chaſeis, parcis, boſcis, warren', ferliis, mercatis, libertatibus, liberiis conſuetudinibus, wardis, releviis, eſchaetis, & ſerviciis tenen' tam liberorum quam nativorum, & omnibus aliis ad prædict' Caſtr', Vill', Honores, terr' & tenementa, qualitercunque ſpectant' ſive pertinent', de prædicto Rege Edwardo tertio & hæredibus ſuis imperpetuum. Prædictuſque nuper Rex Edwardus tertius per cartam ſuam prædictam in parliamento prædicto, cum communi conſenſu prædicto, ac authoritate parliamenti illius, prædict' caſtr' de Wallingford & cætera præmiſſa cum pertinentiis, inter alia, eidem ducat' annexit & univit, eidem ducatui imperpetuum [illegible]manſur'; ita quod ab eodem ducatu aliquo tempore nullo modo ſeparentur, nec alicui ſeu aliquibus aliis quam dicti loci ducibus, per prædictum nuper regem vel hæredes ſuos donarentur, ſeu quomodolibet concederentur; ita etiam quod præfato duce, ſeu aliis ejuſdem loci ducibus, deceden', & filio ſeu filiis, ad quos prædictus ducatus, prætextu Conceſſion' prædict' ſpectare dignoſceretur, non apparentibus, idem ducatus cum prædict' Caſtr' & cæter' præmiſſ. præconceſſ. ad præfatum nuper regem, vel hæredes ſuos reges angliæ, reverterentur, in manibus ipſius nuper regis & ipſorum hæredum ſuorum regum angliæ retinend', quouſque de hujuſmodi filio ſeu filiis in dicto regno angliæ hæredit' ſucceſſur' appareret, ut eſt dictum, quibus tunc ſucceſſive ducatum illum cum pertinentiis præfatus nuper Rex pro ſe & hæredibus ſuis conceſſit & voluit liberari tenend' de ipſo nuper rege & hæredibus ſuis imperpetuum. Cumq; inſuper per quendam actum edit' in parliamento domini Henrici nuper Regis angliæ octavi tent' apud Weſtm. prædictum, viz. in ſecunda Seſſione ejuſdem parliamenti inchoat' & tent' duodecim' die Aprilis anno regni dicti nuper Regis Henrici octavi triceſimo primo, & per diverſas prorogationes continuat' uſque viceſimum quintum diem Maii, anno regni dicti nuper Regis Henrici octavi 32. & abinde tent' & continuat' uſque diſſolutionem ejuſdem Parliamenti viceſimo quarto die Julii anno triceſimo ſecundo ſupradicto, recitan' quod cum in Parliamento tent' anno undecimo regni nuper Regis præclaræ memor[illegible]

Co. Lit. 17. a. b.

Regi

Regis Edwardi tertii, inter alia stabilit', inactitat', & ordinat' fuit, Quod primogenitus filius, anglice **the eldest Son**, Regis angliæ, qui foret hæreditabilis, anglicæ **inhetitable**, huic regno angliæ, foret dux Cornubiæ, & quod idem ducatus Cornub' semper foret primogenit' fil', anglice **to the eldest Son**, Regum angliæ, qui foret proxim' hæres dicto regno. Et quod ipse haberet & gauderet erga manutentionem & supportationem principalis status sui, anglice **of his princely Estate**, totum & integrum ducat' Cornubiæ, ac omnia castr', honor', dominia, anglice **Dominions**, maner', terras, tenementa, & omnia alia hæreditamenta spectan' vel pertin' dict' ducatui, sive reputat' & capt' fore pars, parcell', vel membr' dict' ducat': Ac pro eo quod honor & castr' de Wallingford, in comitatu Berk, tunc fuit & a diu fuisset pars & parcell' hæredit' & possessionum dicti ducat' Cornub', ac reputat' & capt' fore membr' dict' ducat'; qui quidem honor & castr' jacebat prope maner' ejusdem nuper Reg' Henrici octavi de Newelme, alias vocat' Ewelme, in Com' Oxon', & fuit perquam commodum, Anglicæ **Commodious**, decens, & amœnum pro eodem nuper Rege Henrico octavo: In consideratione quorum, & pro aliis urgentibus causis, dictum nuper Regem Henricum octavum specialiter moventibus, inactitat' & ordinat' fuit, authoritate ejusdem parliamenti dicti nuper Regis Henrici octavi, Quod dict' Honor & Castrum de Wallingford, ac omnia dominia, maneria, terr', tenementa, & alia hæreditamenta, quæcunque forent, existen' partes, parcell', vel membr', dicti Honoris & Castri, aut appenden' sive pertinen' dicto Honori & Castro aut alicui dominio vel maner' eisdem pertinen', aut reputat' vel capt' fore pars vel parcell' dict' Honoris sive Castri, aut alicujus membr' ejusdem, forent extunc imposterum, authoritate ejusdem parliamenti, separata, disannexa, anglice **disannered**, & deartuata, anglice **dismembred**, a dict' ducat' Cornubiæ, & non forent in aliquo modo extunc imposterum reputat', vocat', accept' vel capt', per nomen Honoris de Wallingford, nec fore aliqua pars, parcella, vel membrum dicti ducatus Cornubiæ: Et quod prædictum manerium dicti Regis de Newelme, alias Ewelme, extunc imposterum semper nominaretur, vocaretur, acciperetur, reputaretur, & adjudicaretur fore, Honor de Newelme, alias Ewelme. Et quod dictus nuper Rex Henricus octavus haberet consimiles Libertates, Franchesias, Privilegia, Regalit', & Jurisdictiones tam in prædicto Honore de Newelme, alias Ewelme, quam in prædict' Maner', Castr', terr', tenement' & hæreditament', existen' pars, parcell', vel membr' dicti

Honoris de Wallingford, ad omnia intentiones & propoſita, qual' fuerunt in aliquo modo ſpectan', pertinen', vel uſitat', in vel ad dict' Honorem de Wallingford. Et quod conſimiles proceſſus, ſect', & placita imperpetuum tenerentur, reciperentur, & uſitat' forent in dicto Honore de Newelme, alias Ewelme, qual' ad primum diem ejuſdem parliamenti fuiſſent uſitat' vel exercitat' in dicto Honore de Wallingford. Et quod dictus nuper Rex Henricus octavus haberet ſibi hæredibus & ſucceſſoribus ſuis imperpetuum dictum Honorem & Caſtrum de Wallingford, ac omnia dominia, maneria, terr', tenementa, ac alia hæreditamenta quæcunque, pertinen' dicto Honori vel Caſtro, vel reputat' ſeu accept' fore aliqua pars poſſeſſionum, vel parcell' ſive membr', dicti Honoris ſive Caſtri extunc impoſterum fore ſeparat' & diviſ. a præd' ducatu: Et quod idem Honor & Caſtr' de Wallingford extunc impoſterum nominaretur & vocaretur caſtrum & manerium de Wallingford; Ac etiam quod idem caſtrum & maner' de Wallingford, ac omnia dominia, maner', terr', tenementa, & cætera hæreditamenta quæcunque quæ adtunc fuiſſent ſpectan' ſive pertin' dicto caſtro & manerio, vel reputat' & capt' fore aliqua pars, parcella, vel membrum inde, Ac omnimod' libertates, franchiſ. privilegia, regalitates, & juriſdictiones, præantea uſitat', infra dictum honorem de Wallingford, extunc impoſterum forent unita, annex', colligat', anglice knit, adjudicat', eſtimat', anglice, deemed, accept', reputat', & vocat' pars, parcell', & membr' dicti honoris de Newelme, alias Ewelme, in prædicto comitatu Oxon'. Et ulterius inactitat' fuit authoritate prædicti parliamenti prædicti nuper regis Henrici octavi, Quod omnes & ſingulæ perſona & perſonæ quæ tunc tenerent aliqua maneria, terras, tenementa, vel hæreditamenta, de prædicto nuper rege Henrico octavo vel de excellente & indubitato principe Edwardo tunc filio & hærede apparen' ejuſdem nuper regis Henrici octavi, ut de dicto honore de Wallingford, aut de aliquibus dominiis vel maner' exiſten' parcell' vel membr' dicti honoris de Wallingford, extunc impoſterum tenerent dicta maneria, terras, tenementa, & hæreditamenta ſua de dicto nuper rege Henrico octavo, hæred', & ſucceſſoribus ſuis, ut de prædicto manerio & caſtro ſuo de Wallingford, aut de dictis dominiis vel maneriis, exiſten' parcell' & membr' dicti honoris de Wallingford, parcell' dicti honoris de Newelme, alias Ewelme, per eadem reddit', ſectas, conſuetudines, & ſervic', qual' ipſæ & eorum quælibet tenuerunt, ſolverunt, vel fecerunt, ante editionem actus parliamenti illius, &

non

non per plura aut alia redditum, sectas, consuetudines, vel servitia. Salvis omnibus personæ & personis, & corporibus politicis, hæredibus & successoribus suis, ac hæredibus & successoribus eorum cujuslibet, alias quam excellenti & indubitato domino principi Edwardo qui tunc fuit, & hæredibus suis, & cuilibet alii qui extunc imposterum continger' fore primogenitus filius regis, anglice, **the King's eldest Son**, & proxim' hæres coronæ hujus regni angliæ, omni tali jure, titul', interesse, possessione, feodis, officiis, annuitatibus, redditibus, communiis, & omnibus aliis commoditatibus, ac hæreditament' quibuscunque, quæ ipsæ vel eorum aliqua legitime tenuerunt, potuerunt, debuerunt vel debuissent habuisse, si prædictus actus minime habitus nec factus fuisset. Et ulterius inactitat' fuit, authoritate prædicti parliamenti præd' nuper regis Henrici octavi, quod prædictus excellens & indubitatus princeps Edwardus qui tunc fuit, & quilibet alius qui extunc imposterum continger' fore primogenitus filius regis & proxim' hæres coronæ hujus regni, haberet teneret, & gauderet imperpetuum annex', unit', ac colligat', anglice **knit**, prædicto ducatui cornubiæ, pro & in plena recompensatione prædicti honoris & castri de Wallingford & cæterorum præmissorum in eodem actu præspecificat', dicto honori de Wallingford tunc antea spectan', ut pars & parcell' dict' ducat' cornubiæ, maneria de West Taunton, Trelowia, & Landulph, cum pertinentiis in comitatu Cornubiæ, inter alia, in talibus modo & forma, & de tali consimili statu, qual' idem excellens & indubitatus princeps Edwardus ante editionem actus parliamenti illius habuit, tenuit, vel gavisus fuit prædict' honorem & castrum de Wallingford, & cætera præmiss. parcell' ejusdem honoris: Et quod omnia & singula prædict' maneria, cum omnibus, & singulis suis pertinentiis, tunc inter alia, limitat' & assignat' per eundem actum, in prædicto parliamento prædicti nuper regis Henrici octavi, prædicto ducatui Cornubiæ, & eorum quodlibet, extunc imposterum forent reputat', existimat', anglice **deemed**, adjudicata, accept', & capt', authoritate parliamenti illius, ut pars, parcell', & membr' dict' ducat' Cornubiæ, in talibus, & consimilibus modo & forma ad omnia proposita & intentiones, qual' dict' honor & castrum de Wallingford, ac membra & parcell' ejusdem, fuerunt ante editionem actus illius; aliquo actu, lege, consuetudine, vel usu, in contrarium non obstante, prout per eundem actum in prædicto parliamenti prædicti nuper regis Henr' octavi edit', inter alia, plenius liquet. Cumque ante & usq; tempus confectionis præd' actus parliamenti, edit' in præd' parliamento prædicti nuper regis Henrici octavi, prædict'

honor & castrum de Wallingford, & membr' & parcell' inde, fuerunt pars, parcell', & membr' prædicti ducat' Cornubiæ, secundum formam & effectum prædict' chartæ & concession' per prædict' nuper regem Edwardum tertium, cum communi assensu prædict' ac authoritate parliamenti sui prædicti, ut præfertur, confect', & prout in prædict' charta mencionatur & superius recitat'; prædictusque excellens & indubitatus princeps Edwardus, in prædict' actu, edit' in prædicto parliamento prædicti nuper regis Henrici octavi, nominat', ante tempus ac tempore confectionis ejusdem actus edit' in prædicto parliamento prædicti nuper regis Henrici octavi, habuit, tenuit, & gavisus fuit prædict' honor' & castr' de Wallingford, & al' præmiss, parcell' ejusdem honoris, in tali modo & forma, & de tali statu prout inactitat' & limitat' existit in prædict' charta & concession' prædicti nuper regis Edwardi tertii Anno Regni sui undecimo supradicto authoritate parliamenti confect', ut præfertur. Ac prædict' honor & castrum de Wallingford in prædicto actu edit' in prædicto parliamento prædicti nuper Regis Henrici octavi mencionat', & prædictum castrum de Wallingford cum hamlett' & membris suis, & prædict' honor de Wallingford cum pertinentiis in prædicta charta & concession' per prædictum nuper Regem Edwardum tertium, ut præfertur, confect' specificat', sunt una & eadem, & non alia neque diversa. Quorum prætextu prædictus nuper princeps Edwardus primogenitus filius prædicti nuper Regis Henrici octavi, ac dux Cornubiæ fuit seisitus de prædictis maneriis de West Taunton, Trelowia, & Landulph cum pertinentiis in dominico suo ut de feodo, ut parcell' ducat' sui Cornubiæ prædict', secundum formam & effectum prædict' actus parliamenti: Ipsoque sic inde seisito existen' prædictus nuper Rex Henricus octavus postea, apud Westm' præd', obiit, prædicto Edwardo nuper principe existen' filio & hæred' præd' nuper Regis Henrici octavi; prædictusque Edwardus nuper princeps eidem nuper Regi Henrico octavo in prædicto Regno Angliæ jure hæreditar' successit, & Rex prædicti Regni Angliæ, nomine Edwardi sexti Regis Angliæ, devenit: Posteaque idem Edwardus sextus nuper Rex Angliæ, apud Westmonasterium prædict', obiit sine hærede de corpore suo exeun', domina Maria nuper Regin' Angliæ existen' soror' & hærede prædicti nuper Regis Edwardi sexti; prædictaque domina Maria eidem nuper Regi Edwardo sexto, in prædict' regno angliæ, jure hæredit' successit, & Regina prædicti Regni Angliæ devenit: Posteaque eadem Regina Maria, apud Westmonast' prædict', obiit sine hærede de corpore suo exeun', domina Elizabetha nuper Regina Angliæ existen' soror' & hærede prædictæ nuper Reg

Mariæ

Mariæ; prædictaque domina Elizabetha, eidem nuper Reginæ Mariæ, in prædicto Regno Angliæ jure hæreditar' ſucceſſit, & Regin' prædict' Regni Angliæ devenit': Poſteaque eadem Regina Elizabetha, apud Weſtmonaſter' prædict', obiit ſine hærede de corpore ſuo exeun' nobis nunc & adhuc exiſten' conſanguin' & hæred' prædictæ nuper Regin' Elizabeth; Noſque eidem nuper Reginæ Elizabethæ, in prædict' Regn' Angliæ jure hæreditario ſucceſſimus, & Rex Angliæ devenimus, & ſumus in præſenti. Jamque prærariſſimus princeps, filius noſter primogenitus Henricus, nunc dux Cornubiæ, nobis ſupplicavit, ut cum prædicta domina Elizabetha, nuper Regina Angliæ, per literas ſuas patent', magno ſigillo ſuo Angliæ ſigillat', geren' dat' apud Weſtm' prædictam, ſecundo die Maii Anno Regni ſui Triceſimo ſertimo, conceſſit quibuſdam Gellio Merrick, tunc armigero poſtea militi, jam defuncto, & Henrico Lindley, tunc armigero modo militi, prædicta maner' de Weſt Taunton, Trelowia, & Landulph, cum pertin', habendum & tenend' eiſdem Gellio Merrick, & Henrico Lindley, & hæred' ſuis imperpetuum, prout in literis paten' ill' plenius continetur: Ac cum prædict' maner' de Weſt Taunton, Trelowia, & Landulph, præfato ducatui, ut præfertur, annex' & unit', ad eundem nunc ducem, prætextu don', conceſſion', & union' prædict', authoritate prædicti parliamenti pertinuerunt, & adhuc pertinere debeant, ac membr' & parcell' ejuſdem ducatus extiterint, & adhuc exiſtant prout idem nunc princeps & dux, viis & modis quibus convenit, paratus eſt edocere, velimus literas patent' prædictas, de prædict' maneriis de Weſt Taunton, Trelowia, & Landulph, ut præfertur, factas, revocare & adnullare, & maneria illa cum pertinentiis in manus noſtras ſeiſire, ut eadem maneria eidem nunc duci, tanquam membra & parcell' ducatus prædicti, habendum & tenendum juxta formam & effectum don', conceſſion', & union' prædict', liberari faciamus. Nos, volentes in hac parte fieri quod eſt juſtum, Tibi præcipimus, quod per probos & legales homines de balliva tua Scire fac' præfat' Henr' Lindley militi, & Johanni Hele militi, Servien' ad legem prædictor' maner' de Weſt Taunton, Trelowia, & Landulph tenen', necnon cuicunque al', & quibuſcunque aliis tenent' eorundem manerior' de Weſt Taunton, Trelowia, & Landulph, vel eor' alicujus, quod ſint coram nobis in cancellar' noſtra in Octabis S. Hill' proxim' futur', ubicunque tunc fuer', ad oſtendend' ſi quid pro nobis aut pro ſeipſis habeant, vel dicere ſciant, quare literæ patentes prædictæ de prædictis maneriis de Weſt Taunton, Trelowia, & Landulph, cum pertinentiis, ut præfertur, fact', revocari & adnullari, ac maneria illa cum pertinentiis in manum noſtram ſeiſiri non debeant, ut ea præfat' nunc duci, tanquam mem-

bra & parcell' ducat' prædict' ſecundum formam & effectum don', conceſſionis, & union' prædict', habend' & tenend', liberari faciamus. Et ad faciend' & recipiend' ulterius, quod cur' noſtra tunc & ibidem conſ. in hac parte. Et habeas ibi nomina illorum per quos eis Scire feceris, & hoc breve. T. meipſo apud Weſtmonaſterium xxviii. die Novembris, Anno Regni noſtri Angliæ, Franciæ, & Hiberniæ tertio, & Scotiæ triceſimo nono: & modo ad hunc diem, viz. prædict' Octabas Sancti Hillarii, coram dicto domino Rege nunc in cur' dictæ Cancellar' ſuæ hic, ſcilicet apud Weſtmonaſterium prædictam, venit Edwardus Coke, miles, Attornat' dicti domini Regis nunc generalis, qui pro eodem domino Rege nunc, in hac parte ſequitur, in propria perſona ſua: Et Franciſcus Godolphin miles, vic' prædict' comitat' Cornubiæ exiſten', modo hic mand' breve prædictum ſervit' & execut' in forma ſequen', viz. Quod ipſe, virtute brevis illius ſibi direct', viceſimo primo die Decembr' Anno tertio ſupradicto, Scire fecit per Johannem Edgecombe, & Walterum Blunt probos & legales homines de balliva ſua, præfat' Henrico Lindley militi, Ac etiam eiſdem die & anno, per eoſdem probos & legales homines, Scire fecit præfato Johanni Hele militi, & cuidam Warwico Hele milit', tenen' prædict' manerior' de Weſt Taunton, Trelowia, & Landulph, ſuperius mencionat', eſſend' coram dict' domino Rege nunc hic ad hunc diem, ad oſtendend', faciend' & recipiend', quod breve illud in ſe exigit & requirit. Et prædicti Henricus Lindley miles, Johannes Hele miles, & Warwicus Hele miles, quarto die placiti ſolempnit' exact' per Richardum Wilkenſon Attornatum ſuum, ven' & pet' licentiam inde interloquend', Et eis conceditur, &c. Et ſuper hoc dies inde datus eſt præfato Henrico Lindley, Joh' Hele, & Warwico Hele, coram dicto domino Rege in dicta cur' hic, ſcilicet apud Weſtmonaſterium prædict', uſque in Octabis purificationis beatæ Mariæ tunc proxim', &c. ubicunque, &c. videlicet præfato Henrico, Johanni, & Warwico, ad interloquendum & tunc ad reſpondendum, &c. Idem dies dat' eſt præfato Edwardo Coke militi, Attornat' dicti domini Regis nunc generali, qui, &c. tunc hic, &c. Ad quas quidem Octabas purificationis beatæ Mariæ, coram dicto domino Rege nunc in dict' cur' hic, ſcilicet apud Weſtmonaſterium prædict', ven' tam prædictus Edwardus Coke miles, Attornat' dicti domini Regis nunc generalis, qui, &c. in propria ſua, quam prædict' Henricus Lindley, Johannes Hele, & Warwicus Hele, per Attornatum ſuum prædictum Et ſuper hoc iidem Henricus, Johannes, & Warwicus, per Attornat' ſuum prædictum, ulterius pet' licenc' inde interloquend', coram dicto domino Rege nunc in dicta cur' hic, ſcil' apud Weſtmonaſt' prædictam, uſq; in quinden' Paſchæ

tunc proxim' ſequen' &c. Ubicunque &c. et tunc ad reſpondend' &c. Et habent &c. Idemque dies dat' eſt præfato Edwardo Coke militi, Attorn' dicti domini Regis nunc generali, qui &c. tunc hic &c. Ad quam quidem quinden' Paſchæ, coram dicto domino Rege nunc in dicta Cur' hic, ſcilicet apud Weſtmonaſter' prædict', ven' tam prædictus Edwardus Coke miles, Attorn' dicti domini Regis nunc generalis, qui &c. in propria perſona ſua, quam prefat' Hen. Lindley, Johannes Hele, & Warwicus Hele, per Attornat' ſuum prædictum: Et ſuper hoc prædict' Henricus, Johannes, & Warwicus, per Attornat' ſuum prædictum, ulterius pet' licenc' inde interloquend' coram dicto domino Rege nunc in dicta Cur' hic, ſcilicet apud Weſtmonaſterium prædictam, uſque in Craſtino Trinitat' tunc prōximæ ſequen' &c. ubicunque &c. et tunc ad reſpondend' &c. Et habent &c. Idemque dies dat' eſt præfato Edward. Coke milit' Attorn' dicti domini Regis nunc generali, qui &c. tunc hic &c. Ad quem quidem Craſtin' Sanctæ Trinitat' coram dict' domino Rege nunc in dicta Cur' &c. ſcilicet apud Weſtmonaſterium prædictam, ven' tam prædict' Edwardus Coke miles, Attorn' dicti domini Regis nunc generalis, qui &c. in propria perſona ſua, quam prædicti Henricus Lindley, Johannes Hele, & Warwicus Hele, per Attornatum ſuum prædictum: Et ſuper hoc iidem Henricus, Johannes, & Warwicus, per Attornatum ſuum prædictum, ulterius pet' licenc' inde interloquend', coram dicto domino Rege nunc in dicta Cur' hic, ſcilicet apud Weſtmonaſter' prædictam, uſque in Craſtino Animarum tunc proxim' ſequen' &c. ubicunq; &c. & tunc ad reſpondendum &c. Et habent &c. Idemque dies datus eſt præfat' Edwardo Coke militi, Attornat' dicti domini Regis nunc generali, qui &c. tunc hic &c. Ad quem quidem Craſtin' Animar', coram dicto domino Rege nunc in dicta Cur' hic, ſcilicet apud Weſtmonaſterium prædict', ven' tam Henricus Hobart miles, tunc Attorn' ipſius domini Regis nunc generalis, qui pro eodem domino Rege nunc in hac parte ſequitur, in propria perſona ſua, quam prædict' Hen. Lindley, Johannes Hele, & Warwicus Hele, per Attornat' ſuum prædictum. Super quo prædict' Hen. Lindley, per Attorn' ſuum præd', pet' auditum præd' brevis de Scire fac' ſuperius mentionat': Et ei legitur &c. Quo lecto & audito, idem H. Lindley dic', quod nec prædict' Literæ patentes prædict' nuper Reginæ Elizabethæ, de prædict' maner' de Weſt Taunton, Trelowia, & Landulph cum pertinen' in forma prædicta fact', revocari ſeu adnullari, nec maner' illa in man' dicti domini Regis nunc ſeiſiri debent: Quia dic' quod non habetur aliquod tale recordum alicujus talis Act' parliamenti prædict' nuper Regis Edwardi tertii edit', qual' in prædict' brevi de Scire facias ſuperius inde recitat' & ſpecificatur. Nec habetur aliquod

aliquod tale Recordum prædictæ Chartæ per prædictum nuper Regem Edward' tertium authoritate parliamenti prædicti ſuperius fieri ſuppoſit', quale in prædicto brevi de Scire fac' inde ſimiliter ſuperius recitatur & ſpecificatur: Et hoc idem Henricus Lindley parat' eſt verificare: Unde petit Judicium ſi prædictæ literæ paten' prædict' nuper Reginæ Elizabethæ de Maner' prædicto cum pertin' ſic, ut præfert', fact' revocari & adnullari, aut Maneria illa cum pertin' in man' dicti Domini Regis nunc ſeiſiri debeant &c. Et prædicti Johannes Hele & Warwicus Hele, per Attorn' ſuum prædictum, proteſtand' quod non habetur aliquod Recordum alicujus talis Actus Parliamenti dicto undecimo Anno Edwardi nuper Regis Angliæ tertii, nec habetur aliquod tale Recordum prædictæ Chartæ per prædictum nuper Regem Edwardum tertium authoritate Parliamenti prædict', prout in dicto brevi de Scire fac' mencionatur, pro placito dic', qd' nec prædict' literæ paten' prædictæ Reginæ Elizabethæ, de prædict' maneriis de Weſt Taunton, Trelowia, & Landulph, cum pertin', in forma præd' fact', revocari & adnullari, nec maneria illa cum pertin' in manus domini Reg. nunc ſeiſiri debent, aut eorum aliquod ſeiſiri debet: Quia dicit, quod prædicta nuper domina Regina Elizabetha, ante confectionem literarum patent' prædict' præfat' Gellio Merrick & Henrico Lindley, ſeiſit' fuit in dominico ſuo ut de feodo, in jure Coronæ ſuæ Angl' de prædict' Maner' de Weſt Taunton, Trelowia, & Landulph, cum pertin', in prædicto brevi de Scire facias ſuperius ſpecificat' & expreſſis: Et ſic inde ſeiſit' exiſten', ead' nuper Regina Elizabetha, per literas ſuas paten', ſub magno ſigill' ſuo Angliæ ſigillat', geren' dat', apud Weſt. in com' Midd', ſecundo die Maii An' Regni ſui triceſimo ſeptimo, & hic in Cur' prolat', in conſideratione boni, veri, fidelis, & acceptabilis ſervitii prædictæ nuper dom' Reginæ per tunc dil'cum & fidelem Conſanguineum & Conſiliar' ſuum Robertum nuper Comitem Eſſex, prænobilis ordinis garterii mil', ac Magr'um equi ſui, præantea multipliciter fact' & impenſ. qua' pro aliis bonis cauſis & conſiderationibus, prædictam nuper dominam Reginam adtunc ſpecialit' moven', necnon ad humilem petitionem prædict' nuper Comitis Eſſex, de gra' ſua ſpeciali, ac ex certa ſcientia & mero motu ſuis, dedit & conceſſit Maner' præd' cum pertin' (inter alia) præfat' Gellio Merrick & Henrico Lindley, tunc armigeris & poſtea milit', habend' & tenend' eadem maneria cum pertin' præfat' Gellio Merrick & Henrico Lindley, hæred' & aſſign' ſuis imperpetuum. Et prædicta nuper dom' Regina per eaſdem literas paten' conceſſit pro ſe, hæredibus, & ſucceſſor' ſuis quod prædict' Gellius Merrick, & Henric' Lindley, hæred' & aſſign' ſui haberent, tenerent, & gauderent prædict' Maner' cum pertin' juxta intentio-

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nem ipsius nuper Reginæ in eisdem literis patent' content': Ac quod prædictæ literæ patentes essent firmæ, validæ, bonæ, sufficien', & effectuales in lege erga dictam dominam Reginam, hæredes, & successores suos, tam in omnibus Curiis suis quam alibi infra regnum Angliæ, absque aliquibus confirmationibus, licentiis, vel tollerationibus de dicta nuper Regina, hæredibus vel successoribus suis, tunc imposterum per prædict' Gellium Merrick, & Henricum Lindley, aut hæred' sive assignatos suos procurand', vel obtinend', Non obstan' statut' in parliamento domini Henrici nuper Regis Angl' octavi, Anno regni sui tricesimo secundo edit', concernen' ducat' Cornub' & Honor' de Newelme, alias Ewelme, prout in & per prædict' literas paten' plenius liquet & apparet. Virtute quarum quidem literarum paten' prædicti Gellius Merrick, & Henricus Lindley in prædicta maner' cum pertin' intraver', & fuer' inde seisiti in dominico suo ut de feod'; & sic inde seisit' existen', per quoddam scriptum suum indentat' inter præfat' nuper Comitem Essex Gellium Merrick & Henricu' Lindley, ex una parte, & quosdam Augustin' Steward & Michaele' Corsellis, ex altera parte, fact', geren' dat' vicesimo sexto die Decembris anno regni dictæ nuper reginæ Elizabethæ tricesimo octavo, & in cur' cancellar' prædictæ nuper Reginæ, apud Westm' prædict', infra sex menses tunc proxim' sequen', secundum formam statut' inde edit' & provis. debito modo de record' irrotulat', ta' in consideratione summ' trium mille & quingentarum librarum præfat' nuper Comiti Essex per præfat' Augustinum Steward & Michaelem Corsellis solut', qua' pro vigint' solid' præfat' Gellio & Hen. per præfat' Augustinum & Michaelem similit' solut', barganizaver' & vendider' præfat' Augustino & Mich. Maner' prædict' cum pertin': Habend' & tenend' eisdem Augustino & Michaeli, hered' & assign' suis imperpetuum. Virtute quar' quidem barganiæ & venditionis & irrotulament', & vigore cujusdam statuti, in Parliamento domini Henrici nuper Regis Angliæ octavi, quarto die Februarii Anno Regni sui vicesimo septimo, de usib' in possessionem transferend', apud Westmonasterium prædict' tent', edit', prædict' Augustinus & Michaelis fuer' seisit' de Maner' prædict' cum pertinentiis in dominico suo ut de feodo, & sic inde seisit' existen', iidem Augustinus & Michaelis in consideratione summæ trium mille & quingent' librarum præfat' Augustino & Mich. per præfat' Johannem Hele solut', postea de maner' prædict' cum pertin' feoffaver' eosdem Johanne' Hele, tunc Servien' ad legem, & prædictum Warwi' Hele, tunc armigerum & modo militem: Habend' & tenend' eisdem Johanni & Warwico, & hæred' & assign' prædict' Johannis, ad solum & propriu' opus & usum prædict' Johan' & Warwici, & hæred' & assign' prædicti Johan' Hele imperpetuum. Virtute cujus

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quidem feoffamenti prædict' Johannes Hele & Warwicus Hele fuer', & adhuc ſunt, ſeiſit' de maner' prædict' cum pertin', videlicet, idem Johannes Hele in dominico ſuo ut de feodo, & prædictus Warwicus in dominico ſuo ut de libero tenemento pro termino vitæ ſuæ. Et prædict' Johannes Hele & Warwicus ulterius dicunt, quod poſtea in &-per quendam Actum in parliamento prædict' nuper Reginæ, apud Weſtm' prædict', viceſimo ſeptimo die Octobris Anno Regni dictæ nuper Reginæ Elizabethæ Quadrageſimo tertio tent', edit' (inter alia) recitand', quod cum prædicta nuper Regina, ab octavo die Febr' Anno regni ſui viceſimo quinto, tam pro diverſis & magnis pecuniarum ſummis, quam pro diverſ. aliis ſeperalibus conſiderationibus, barganizavit, vendidit, dedit, & conceſſit, per diverſas literas ſuas paten', Indentur', aut alia ſcript', ſub magno ſigillo Angliæ, ſigillat', aut ſigillo ducat' Lancaſtr', aut ſigillo com' Palatin' Lancaſtr', tam corporibus politic' & corporat' quam diverſ. & ſeperal' aliis dictæ nuper Reginæ ſubditis, diverſ. & ſeperal' Honor', maner', terr', ten', reddit', reverſion', ſervic', et alia hæreditamenta, in feodo ſimplici, feodo talliato, aut pro termino vitæ, vitarum, vel annorum, prout in eiſdem ſeperal' literis paten', Indentur', & aliis ſcript' mencionatur & declaratur, Inactitat' fuit, authoritate ejuſdem parliamenti, ad intentionem quod eadem literæ paten', Indentur', & alia ſcript' eſſent de bon', ſtabili, Anglice **availeable**, & perfecto robore & effect', ad omnes & ſingulos dict' nuper Reginæ ſubditos, ſecund' veram intentionem & effect' eorundem, Quod tam omnes & ſingul' literæ paten', Indentur', & alia ſcrip', ſigillat' ſub magno ſigillo Angliæ, aut ſub ſigillo ducat' Lancaſtr', aut ſigillo com' Palatin' Lancaſtr', ante tunc fact' & conceſſ. per prædict' nuper Reginam, pro aliquibus denar' ſummis, aut pro & ſuper aliquibus aliis conſiderationibus, a prædicto octavo die Februarii Anno viceſimo quinto ſupradicto, quam omnes aliæ literæ paten' tunc poſtea per dictam nuper Reginam faciendum pro aliqua pecuniarum ſumma aut ſummis, aut aliis conſiderationibus, ante ultimum diem dict' tunc præſent' Seſſion' dicti parliamenti, Et inſuper omnes aliæ literæ paten' infra ſpacium unius anni tunc proxim' ſequen' faciend' vigore aut ſecundum verum purport' aut veram intentionem commiſſionis ſub magno ſigillo Angliæ tunc in eſſe, pro venditione terræ dictæ nuper reg' alicui corpori politic', aut corporat', aut alicui vel aliquibus al' perſon' vel perſonis quibuſcunque, de aliquibus Honor', caſtr', maner', dominiis, grang', meſſuag', terr', ten', prat', paſtur', redd', reverſ. ſervic', boſc', advocationibus, nominationibus, patronag', annuitat', jur', intereſſ. intrationibus, conditionibus, let', cur', libertat', privileg', franchef. aut de aliquibus aliis hæreditament', cum

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pertin', aut de aliqua inde parte vel parcell', cum aut ſub magno ſigil' Angl' ſigillat', aut ſub magno ſigillo Ducat' Lancaſtr', aut ſigillo com' Palatin' Lancaſtr', cujuſcunq; generis, natur', aut qualitat', ill' aut eorum aliq' ſint, aut reputat', cognit', aut capt' fuer', cum pertin' aut aliqua inde parte vel parcell', eſſent bon', perfect' & effectual' in lege, & ſtarent, caperentur, reputarentur, eſtimarent', & adjucat' fore't bon', perfect', cert', valid', Anglice **available**, & effectual' in lege erga dicta' nuper Regina' hæred' & ſucceſſor' ſuos, ſecundum tenorem & effectum prædict' literarum paten', Indentur', aut aliorum ſcript', & quod eadem exponend', conſtruend', eſtimand', & adjudicand' eſſent maxime benefic', Anglice **moſt beneficially**, pro illis quibus prædict' literæ paten', & conceſſion' inde, ſic factæ ſunt, hæred', aſſign', executorib', & adminiſtrat' eorum ſecundum verba & purport' cujuſlibet earund' literar' paten', Indentur', aut alior' ſcript', abſq; aliqua confirmatione, licentia, aut tolleratione dict' nuper Reginæ, hæred', aut ſucceſſor' ſuor'; aliqua male nominatione, male recitatione, aut non recitat', præd' Hon', Caſtr', Maner', ter', ten', & aliorum præmiſſ. aut alicui' inde parcel', aut aliquo defectu inventionum, Anglice **finding**, offic', aut inquiſic' de & in præmiſſ. aut aliqua parte inde, per quæ titulus dictæ nuper Reginæ de & in præmiſſ. inveniri debuit ante editionem prædictarum literarum paten', Indentur', aut aliorum ſcript', vel ulla male recitatione, aut non recitatione dimiſſion' inde fact', tam de recordo quam non de recordo, aut aliqua male recitatione, non recitatione, aut non ver' mentionatione in aliquibus talibus literis paten', conceſſion', aut ſcript' ſtatus aut ſtatuum prædict' nuper Reginæ, de libero ten', vel hæreditat', Anglice **Inheritance**, vel aut in Præmiſſis, aut aliqua inde parte, ad quæ dicta nuper Regina poſt initium Regni ſui fuit, aut tunc poſtea eſſet intitulat' per aliquam attinct', eſcaet', conveianc', aut aſſuranc' quacunq; & in quibus liter' paten', conceſſ. aut ſcript' null' ſtat' fuiſſet' tunc præantea fact', aut ſuppoſit' fieri, recitat' fuit, aut quod tunc eſſet, & reverſio ſeu rem' ſuperinde expectan' in dict' literis paten' conceſſ. aut ſcript' conceſ. aut mentionat' concedi, aut null' defect' certitud' male computationis, ratationis, aut expoſition', Anglice **miſtaking, rating, or ſetting forth**, annui valoris, & ratus præmiſ. aut annuorum redd' reſervat' & pro præmiſſis, aut aliqua inde parcell', mentionat' aut content' in aliquibus literis paten' prædict', aut aliis ſcript', aut pro eo quod præmiſ. tunc fuer', aut aliqua pars inde tunc erat valuat' ad major' aut minor' valor' in dict' literis patentibus, aut ſcript', quam dict' maneria, terr', tenement', & cætera præmiſſ. tunc fuer' aut eſſent in annuo valor', aut aliqua male

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nomination', aut non vera nominatione, villar', hamlett', paroch', aut com', ubi præd' Honor', Maner', ter', ten', redd', hæreditamen', & cætera præmiſſ. & quælibet inde parcell', aut aliqua parcell' inde, jacent aut exiſtunt, aut aliquo defectu veræ nomination' ter', ten', aut hæredit', aut natur' ſpecier' qualitat' aut quant' præd' poſſeſſion' aut hæreditam', aut alicui' inde parcell', aut aliquo defectu veræ nomination' corporation' aut aliquo defectu Attornamen', liberation' aut ſeiſin' aut aliqua male nomination' aliquorum nuper tenen' præd' honor', maner', ter', ten', & hæreditamen', aut alicui' inde parti' ſic vendit', conceſſ. aut dat', aut aliqua male nominatione talis perſonæ aut perſonarum, corpor' politic', aut corporat' qual' ullo tempore ante confectiones talium literarum paten' fuer', aut tunc poſtea eſſent, proprietar' præmiſſor', aut alicui' inde partis, ad contrar' non obſtant, prout per eund' Actum (inter alia) pleni' apparet. Et iidem Johannes Hele & Warwicus ulterius dicunt, quod præd' nuper Regina Elizabeth nunquam habuit aliquem filium, & quod præd' Gellius Merrick & Hen. Lindley fuer', ad & ante temp' confectionis prædictarum literarum paten' ſic, ut præfertur, fact', ſubdit' dict' nuper Regin' Elizabethæ, & nati apud Weſtm' prædict': Quæ omnia & ſingula iidem Johannes Hele & Warwicus para' ſunt verificare: unde pet' judicium ſi præd' literæ paten' præd' nuper Reginæ Elizabethæ de maner' præd' cum pertin' ſic, ut præfertur, fact', revocari & adnullari, aut maner' illa cum pertinen' in manus dicti domini regis nunc ſeiſi' debeant, ſeu eor' aliquod ſeiſiri debeat, &c. Et prædict' Henricus Hobart miles, attornat' dicti domini regis nunc generalis, qui, &c. preſens hic in Cur' in propria perſona ſua quoad prædictum placitum prædicti Henrici Lindley, ſuper ius in forma prædicta placitat', pro eodem Domino Rege dicit, quod prædict' Henr. Lindley ad dicend' quod non habetur aliquod tale Record' alicujus talis Actus Parliament' præd' nuper Regis Edwardi tertii edit', qual' in prædicto brevi de Scire facias inde recitat' & ſpecificat', Nec aliquod tale Record' præd' Chartæ per eundem nuper Regem Edwardum tertium authoritate parliamenti prædicti confect' qual' in prædicto brevi de Scire facias inde ſuperius recitat' & ſpecificat', admitti non debet, Quia dic', quod dict' tus dominus Jacobus nunc Rex Angliæ inſpexit irrotulament' prædict' Act' parliamenti prædict' nuper Regis Edwardi tertii, & prædictæ Chartæ per prædictum nuper Regem Edwardum tertium, authoritate parliamenti præd' confect', in præd' brevi de Scire facias mentionat', in rotulis Cancell' præd' dom' regis nunc, infra Turrim ſua' London', de reg. præd' nuper reg. Ed. tertii undecimo irrotulat', de record' reſiden'; cui' quid' irrotulament' Act' parliamenti, & Char' præd'

prædictæ tenor', prædictus dominus Jacobus nunc Rex Angliæ, per literas ſuas paten' magno ſigillo ſuo Anglia ſigillat' hic in Cur' per eund' Attorn' dicti domini Regis nunc pro eodem dom' Rege nunc prolat' geren' dat' apud Weſtm' quinto die Martii Anno Reg' dicti dom' Reg. nunc Angl'. Franc', & Hibern' tertio, & Scotiæ triceſimo nono, duxit (inter alia) exemplificand', & fec' exemplificar'. Quæ quidem exemplificatio quoad irrotul' præd' Actus parliament', & præd' Chartæ, ſequit' in hæc verba. Jacob. dei gratia Angl', Scotiæ, Franc', & Hib' Rex fidei defenſor, &c. Omnib' adquos præſentes literæ pervenerint, Salutem: (*a*) Inſpeximus irrotulament' cujuſdam Chartæ geren' dat' decimo ſeptimo die Marcii An' Regni domini Edwardi nuper Regis Angl' tertii undecimo, dilecto & fideli ſuo Edwardo Comiti Ceſtr', filio ſuo primogenito conceſſ. in Rotulis Cancellar' noſtræ infra Turrim noſtram London', de Recordo reſiden', in hæc verba. (*b*) Edwardus Dei gratia Rex Angl', domin' Hib', & dux Aquitaniæ, Archiepiſcop', Epiſcop, Abbatibus, Prioribus, Comitib', Baronibus, Juſticiar', vicecomitibus, præpoſitis, miniſtris, & omnibus ballivis, & fidelibus ſuis, Salute'. Inter cætera regni inſignia, illud arbitramur fore potiſſimum, ut ipſum ordinum, dignitat', & officiorum diſtributione congrua vallat', ſanis fulcit' conciliis, & robuſtorum potentiis teneatur: plurimis itaq; gradib' hæreditar' in Regno noſtro, cum per deſcenſum hæreditat' ſecundum legem Regni ejuſdem ad cohæred' & participes, tum deficiente exitu, & aliis eventibus variis ad man' regias devolut' paſſum eſt a diu in nominib', honorib', & graduum dignitate defect' multiplicem dict' Regnum. Nos igitur, ea per quæ Regnu' noſtrum decorari, idemq; Regnum ac ſancta ejuſdem Eccleſia, aliæ etiam ter' noſtro ſubject' dominio, contra hoſtium & adverſariorum conat' ſecuri' & decentius defenſari, paxq; noſtra int' noſtros ubiq; ſubditos conſervari illæſa poterint, meditatione ſolicita intuentes, ac loca ejuſdem Regni inſignia priſtinis inſigniri honorib' cupientes, noſtræque conſiderationis intuitus ad perſonam dilecti & fidelis noſtri Edwardi, Comitis Ceſtr', filii noſtri primogeniti intimos convertentes, volenteſq; perſonam ejuſdem honorari, eidem filio noſtro nomen & honore' Ducis Cornub' (*c*) de co'i aſſenſu & conſilio Prælatorum, Comitum, Baronum, & aliorum de conſilio noſtro, in preſenti parliamento noſtro apud Weſtm' die Lunæ proxim' poſt feſtu' Sancti Mathiæ Apoſtoli proxim' p'terit' convocat' exiſten', dedimus, ipſumq; in duce' Cornub' præfecim', & gladio cinxim', ſicut decet, Et ne in dubiu' verti poterit aliqualiter in futur', quid aut quant' idem dux, ſeu alii duces, dicti loci, qui pro tempore fuerint, nom' ducat' præd' habere debeant, omn' in ſpecie quæ ad ipſu' ducat' p'tinere vol' hac char' noſt' duxim' inſerenda. Dedimus itaq; & conceſſim' pro nobis

(*a*) 5 Co. 53. 2. b. Poſtea 15. a.

(*b*) Pollexfen's Argument in quo Warranto 83.

(*c*) Pollexfen's Argument in quo Warranto 83.

bis & hæred' nostris, & hac presen' Charta nostra confirmavimus eidem filio nostro, sub nomine & honore ducis dict' loci, Castra, maneria, terras, & ten', & alia subscript', ut ipse statu' & honorem dicti duc', juxta gener' sui nobilitat', valeat continere, & onera in hac parte incumben' facili' supportare, viz. vicecomitatum Cornub' cum pertin'; Ita quod præfat' dux, & alii duces ejusdem loci pro tempore existen', vicecomit' prædict' com' Cornub' pro voluntat' sua faciant & constituant, & facere & constituere possint, ad exercend' & faciend' offic' vicecomit' ib'm, sicut hactenus fieri consuevit, sine occasione vel impediment' nostri vel hæred' nostrorum imperpetuum. Nec non Castr', Burg', Maner', & Honor' de Launceneton cum parco ibidem, & aliis pertin' suis, in com' Cornub' & Devon', Castr' & Maner' de Tremeton, cum villa de Salteſh ac parco ibidem & aliis pertin' suis in com' prædicto, Castr' Burg' & Maner' de Tintagel cum pertin' in dicto com' Cornub', Castr' & Maner' de Restormel cum parco ibidem & aliis pertin' suis in eodem com', ac Maner' de Clymeslond cum parco de Keribullock & aliis pertin' suis, Tibeste cum balliva de Pouderſhire & aliis pertin' suis, Tewynton cum pertin', Helleston in Kerier cum pertin', Moresk cum pertin', Tewarnaile cum pertin', Pengkneth cum pertin', Penlyn cum parco ibidem & al' pertin' suis, Rellaton cum Bedelleria de Estwyneleſhire & aliis pertin' suis, Helleston in Trigſhire cum parco de Helleſburie & al' pertin' suis, Lyskiret cum parco ibidem & al' pertin' suis, Calistock cum piscar' ibidem & al' pertin' suis, & Talskyd cum pertin' in eodem com' Cornub', & villam de Lostwithiell in eodem com' cum molendino ibidem & al' pertin' suis: Ac prisas & Custumas nostras vinorum in eodem comitatu Cornub'. Nec non omnia proficua portuum nostrorum infra eundem comitat' Cornub' ad nos spectan', simul cum Wrecco maris, tam de Balena & Sturion & aliis piscibus quæ ad nos ro'ne prærogativæ nostræ spectant, quam aliis quibuscunque ad wreccum maris hujusmodi qualitercumque pertinen' in toto prædicto com' Cornub': Ac proficua & emolumenta comitat' tent' in prædicto com' Cornub': Ac Hundred',& cur' eorundem, in comitat' illo, ad nos spectan': Nec non Stannariam nostram in eodem com' Cornub', una cum Cunag' ejusdem Stannariæ & cum omnib' exitibus & proficuis inde provenien', Ac etiam expleciis, profic', & perquisit' Cur' Stannariæ & Mineræ in eodem com' (except' duntaxat mille marcis, quas dilecto et fideli nostro Willihelm' de Montea cuto Comiti Sarum concessimus pro nobis & hæred' nostris, percipend' sibi et hæred' suis masculis de corpore suo legitime procreat', de exitibus, et profic' Cunag' antedictum, quousque Castr' et Manerium de Tonbrigge

cum

cum pertin' in com' Wiltes, Ad Maner' de Aldebourne, Aumbreſbur', & Winterbourne, cum pertin' in eodem com', Et Maner' de Caneford cum pertin' in com' Dorſet, Et Maner' de Hengſtrigge & Charleton cum pertin' in com' Somerſet, quæ dilect' & fidelis noſter Johanne de Warenna comes Surr' & Johanna uxor ejus tenent ad terminum vitæ eorundem, & quæ, poſt mortem ipſorum, ad nos & hæred' noſtros reverti deberent, poſt deceſſum eorund' Comitis & Johannæ, præfat' Comiti Sarum & hæred' maſculis de corpore ſuo legitime procreat', in valorem octingentarum marcarum per annum, conceſſim' remanere; & ducent' mercat' terr' & reddit', quas eidem Comiti Sarum, habend' in forma prædicta providere conceſſim', devenerint ad manus ſuas: Ac etiam Stannariam noſtram in prædicto com' Devon' cum cunag', & omnib' exit' & profic' ejuſdem, Ac etiam expletiis, profic', & perquiſit' Cur' ejuſdem Stannariæ: Ac aquam de Dertmouth in eodem com': & annuam firmam vigint' librarum civitatis noſtræ Exon': Ac priſas & Cuſtumas noſtras vinorum in aqua de Sutton in eodem com' Devon': Necnon Caſtr' de Wallingford cum Hamlett' & membr' ſuis, & annuam firma' villæ de Wallingford, cum honoribus de Wallingford & de ſancto Walerico, cum pertin', in com' Oxon' & al' com' ubicunq; Honores illi fuerint: Ac Caſt' maner', & villam de Berkhamſted cum parco ibidem, una cum Honor' de Berkhamſted in com' Hertf', Buck' & Northt', & aliis pertin' ſuis: & Maner de Biflet cum parco ibidem & aliis pertin ſuis in com' Surr'. Habend' & tenend' eidem duci & ipſius & hæredum ſuorum Regum Angl' filiis primogenitis & dicti loci ducib', in Regno Angl' hæreditar' ſucceſſur', una cum feod' milit', Advocac' Eccleſiarum, Abb'iarum, Priorat', Hoſpital', Capell', & cum Hundred', Piſcar', Foreſtis, Chaſeis, percis, boſcis, warren', feriis, mercatis, libertat', liberis conſuetudinibus, Ward', releviis' eſcaet', & ſervic' tenen', tam liberorum quam nativorum, & omnibus aliis ad præd' Caſtr', Burg', Vill', maner', honores, Stannar' & Cunag', terr', & ten', qualitercunq; & ubicunq; ſpectan' ſive pertin', de nobis & hæred' noſtris imperpetuum; ſimul cum quater viginti libris annuæ firmæ, quas dil'cus & fidelis noſter Johannes de Meere nob' per annum, ad totam vitam ſuam, ſolvere tenetur, pro Caſtro & Maner' de Meere cum pertin' in com' Wiltes, ſibi, ad terminum vite ſuæ habend' per nos conceſſ. percipiend' ſingul' annis per manus ejuſdem Johannis ad totam vitam ſuam; & cum prædict' mille marcis annuis præfat' Com' Sarum de exit' Cunag' prædict' per nos ſic conceſſ. poſt adeptam, per ipſum vel dictos hæred' ſuos maſcul' de corpore ſuo procreatione, ſeiſinam dictum Caſtrum & Manerium de Tonbrigge, ac Manerium de Aldebourne, Aumbreſbury, Winterbourne, Caneford, Hengſtrigge,

Charleton, poſt mortem eorundem Comitis Surr' & Johannæ; ac dict' ducent' mercat' terr' & redd' eidem Comiti Sarum & dict' hæred' ſuis maſculis de corpore ſuo procreat', ſic providend' pro rata porcionis eorundem caſtr', maner', terr', & ten', cum integralit' vel particularit' ad manus ejuſdem Comitis Sarum, vel dictorum hæred' ſuorum maſculorum de corpore ſuo procreat', devenerint. Conceſſimus inſuper pro nobis & hæred' noſtris, & hac Carta noſtra confirmavimus, quod caſtr' & maner' de Knareſburgh, cum hamlet' & membr' ſuis, ac Honor de Knareſburgh, in com' Eborum & al' com' ubicunq; Honor ill' fuerit, & maner' de Iſtelworth cum pertin' in com' Midd' quæ Phillippa Regina Angliæ Conſors noſtra chariſſima ad terminum vitæ ſuæ, ac Caſtrum & maner' de Lydeford cum pertin', & cum chaſea de Dertmore cum pertin', in dicto com' Devon', Et maner' de Bradeneſhe cum pertin' in eodem com', quæ dilectus & fidelis noſter Hugo de Audele comes Glouc', & Margareta uxor eidem, ad terminum vitæ ejuſdem Margaretæ, ac' dict' Caſtr' & maner' de Meere cum pertin', quæ præfat' Johannes, ſic ad vitam tenent, ex conceſſione noſtra, & quæ poſt mortem eorundem Reginæ, Margaretæ, & Johannis, ad nos & hæred' noſtros reverti deberent poſt deceſſum præfat' Reginæ, dict', viz. caſtr' & maner' de Knareſburgh, cum honor', hamlet', & membr' ſuis prædict' & aliis pertin' ſuis, ac maner' de Iſtelworth cum pertin', & poſt mortem prædictæ Margaretæ dict' caſtr' & maner' de Lydeford cum dict' chaſea de Dertmore & al' pertin' ſuis, & maner' de Bradeneſhe cum pertin'; & poſt obit' præd' Johannis dict' caſtr' & maner' de Meere cum pertin', remaneant præf. duci & ipſius ac hæredum ſuorum Regum Angliæ fil' primogenit', & dicti loci ducibus, in Regno Angliæ hæreditar', ut prædicitur, ſucceſſur': Habend' & tenend' una cum feod' milit', Advocac' Eccleſiarum, Abbiarum, Priorat', Hoſpital', Capell', & cum Hundred', Wapent', piſcar', foreſt', chaſeis, parcis, boſcis, warren', feriis, mercat', libertat', liberis conſuetud', ward', releviis, eſcaet', & ſervic' tenen' tam liberorum quam nativorum, & omnibus aliis ad eadem Caſtr', Maner', & Honor' qualitercunq; & ubicunq; ſpectantibus ſive pertin', de nobis ſimiliter & hæredibus noſtris imperpetuum. Quæ quidem omnia Caſtrum, Burg', Vill', Maner', Honor, Stannar' & cunag' firmæ Exon', & Wallingford, terr' & ten', prout ſuperius ſpecificantur, ſimul cum feod', Advocac', & omnibus aliis ſupradictis, prædicto Ducatui præſent' Carta noſtra pro nobis & hæred' noſtris annectimus & unimus eidem imperpetuum remanſur': Ita quod ab omni eodem Ducat' aliquo tempore nullatenus ſeparentur nec alicui ſeu aliquib' aliis quam dicti loci ducib', per nos vel hæred' noſtros donentur ſeu quo modo libet concedantur; Ita etiam

quod

quod præfat' duce ſeu aliis ejuſdem loci ducibus deceden', & filio ſeu filiis, ad quos dict' ducat', prætextu conceſſion' noſtrarum prædictarum, ſpectare dinoſcitur, tunc non apparentib', idem ducat' cum Caſtr', Burg', Vill', & omnibus aliis ſupradictis, ad nos vel hæredes noſtros Reges Angliæ revertat', in manibus noſtr' & ipſorum hæred' noſtrorum Regum Angliæ retinend', quouſq; de hujuſmodi filio ſeu filiis in dict' Regno Angliæ hæreditar' ſucceſſur' appareat, ut dict' eſt, quibus tunc ſucceſſive Ducat' ill' cum pertin', pro nob' & hæred' noſtris, concedimns, & volumus liberari, Tenend' prout ſuperius eſt expreſſum, Conceſſimus in ſuper pro nobis & hæred' noſtris & hac Carta noſtra confirmavims præfato duci, quod idem dux & dict' ipſius ac hæred' ſuorum filii primogeniti, duces dict' loci, imperpetuum habeant liberam Warrennam in omnibus dominicis, terr', caſtr', maner' & aliorum locorum prædictorum, dum tamen terr' illæ non ſunt infra metas foreſtæ noſtræ; Ita quod nullus intret terr' illas ad fugand' in eis, vel ad aliquod capiend' quod ad Warrenna' pertineat ſine licentia & voluntat' ipſius ducis & aliorum ducum ejuſdem loci, ſub foris factur' noſtra decem librarum. Quare volum' & firmiter præcipimus pro nobis & hæred' noſtris, quod dict' dux habeat & teneat ſibi & ipſius & hæredum ſuorum Regum Angl' filiis primogenitis & ejuſdem loci ducibus, in dicto Regno Angl' hæreditar', ut prædicitur ſucceſſur', prædict' vicecomit' Cornub' cum pertin; Ita quod ipſi & alii duces prædict' vicecomit' præd' com' Cornub', pro voluntat' ſua, faciant & conſtituant, & facere & conſtituere poſſint, ad exercend' & faciend' offic' vicecomit ibidem, ſicut hactenus fieri conſuevit, ſine occaſione vel impedimento noſtri vel hæred' noſtrorum imperpetuum: Necnon prædict' caſtr', burg', maner', & honores de Launceneton, caſtr' & maner' de Tremeton, cum vill' de Salteſh, caſtr', burg', & maner' de Tintagell, caſtr' & maner de Reſtormell, ac maner' de Clymeſlond, Tibeſte, Tewynton, Helleſton in Kerier, Moreſk, Tewarnayle, Pengkneth, Penlyn, Rellato' Helleſton in Trigſhire, Lyſkiret, Caliſtock, Talſkyd, & villam de Loſtwithiel cum pertin' ſu', ſimul cum parcis, balliva, bedelleria, piſcar', & aliis ſupradictis in prædict' com' Cornub': Ac prædictas priſas, cuſtum', & proficua portuum prædictorum, ſimul cum dict' wrecco Maris, ac dict' proficua & emolumenta, cum hundred' & cur' prædict' ad nos ſpectan', ac dictam Stannariam in eodem com' Cornub' unam cum cunag' ejuſdem Stannariæ, & cum omnibus exit' & proficuis inde provenientib'; Ac etiam expleciis, profic', & perquiſit' dict' Cur' (exceptum duntaxat dict' mille marcis, quas dilecto & fideli noſtro Willo' de Monteacuto comiti Sarum conceſſimus, pro nobis & hæredibus noſtris,

percipiend' sibi & hæred' suis mascul' de corpore suo legitime procreat', de exit' & profic' Cunag' antedict' quousq; dict' castr' & maner' de Tonbrigge, cum pertin', ac dict' maner' de Aldebourne, Aumbresburie, & Winterbourne, cum pertin', ac dict' maner' de Hengstrigge & Charleton cum pertin', quod præfat' Comes Surr' & Johanna uxor ejus tenent ad terminum vitæ eorundem, & quæ, post mortem ipsorum, ad nos & hæred' nostros reverti deberent, post decessum eorundem Comitis & Johannæ, præfat' Comiti Sarum & hæred' masculis de corpore suo legitime procreat', in valorem octingentarum marcarum per Annum, concessimus remanere; Et dict' ducent' mercat' terr' & redd' quas eidem Comiti Sarum habend' in forma prædicta providere concessim', devenerint ad manus suas, sicut prædictum est. Ac dict' Stannar' in prædict' com' Devon' cum Cunag' & omnibus exit' & proficuis ejusdem; Ac etiam expleciis, profic', & perquisit' Cur' ejusdem Stannar'; aqua' de Dertmouth; & dict' annuam firma' vigint' librar' dictæ civitat' Exon', ac dict' prisas & Custumas vinorum in aqua de Sutton in eodem com' Devon': Necnon prædict' Castr' de Wallingford cum hamlet' & membr' suis, annuam firmam ville de Wallingford, cum dictis Honor' de Wallingford & de sancto Walerico, castr' maner' & vill' de Berkhamsted, cum dict' Honor' de Berkhamsted', & maner' de Biflit, cum parcis & aliis pertin' suis perdict', una cum feod' milit', Advocationibus Ecclesiarum, Abb'iarum, Priorat', Hospital', Capel', & cum Hundred', piscar', foresl', chase', parc', boscis, warrenn', feriis, mercat' libertat', liberis consuetud', wardis, releviis, escaet', & servic' tenen', tam liberorum quam nativorum, & omnibus aliis ad prædict' castr', burg', vill', maner', honor', stannar', & cunag', terr', & ten' qualitercunque & ubicunque spectan' sive pertinen', de nobis & hæredibus nostris imperpetuum; simul cum dict' quater vigint' libr' annuæ firmæ, quas præd' Johannes de Meere nob' per annum, ad totam vitam suam, solvere tenet', pro dict' castr' & maner' de Meere: Sibi ad termin' vitæ suæ habendum per nos concess. percipiend' singulis annis per manus ejusdem Johannis ad totam vitam suam: Et etiam cum prædict' mille marcis annuis præfat' Comiti Sarum de exit' cunag' præd' per nos sic concess. post adeptam, per ipsum vel dict' hæred' suos masculos. de corpor' suo procreat' seisinam dictorum castr' & maner' de Tonbrigge, ac maner' de Aldebourne, Aumbresburie, Winterbourne, Caneford, Hengstrigge, & Charleto' post mortem eorundem Comitis Surr' & Johan' ac dict' ducent' mercat' terræ & redd' eidem Comiti Sarum & dict' hæred' suis masculis de corpore suo procreat' sic providend' pro rata portionis eorund' castr', maner', terr', & ten' cum integralit' vel particularit' ad manus ejusdem Comitis Sa-

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rum vel dictorum hæredum ſuorum maſculor' de corpore ſuo procreat', devenerint', ut eſt dictum. Et quod prædicta Caſtr' & maner' de Knareſburgh, cum hamlet' & membr' ſuis, ac honore de Knareſburgh, & maner' de Iſtelworth, cum pertinen', poſt mortem præfat' Conſortis noſtræ Caſtr' & Maner' de Lydeford cum pertinentiis, & cum dicta Chaſea de Dertmore cum pertinedtiis, & Maner' de Bradeneſhe cum pertinentiis poſt deceſſum prædictæ Margaretæ; & Caſtr' & Maner' de Meere cum pertinentiis, poſt mortem præfat' Johannis de Meere, remaneant præfat' duci: Habendum & tenendum ſibi & ipſius ac hæredum ſuorum Regum Angliæ filiis primogenit', & ejuſdem loci ducibus, in Regno Angliæ hæreditar', ut prædicit', ſucceſſur': una cum feod' milit' Advocac' Eccleſiarum, Abb'iarum, Priorat', Hoſpital', Capell', & cum Hundred', Wapent', Piſcar', foreſt' chaſeis, parcis, boſcis, warrenn', feriis, mercat', libertat', liberis conſuetudinibus, ward', releviis, eſcaet', & ſerviciis tenen', tam liberorum quam nativorum, & omnibus aliis ad eadem Caſtr', Maner', & Honor', qualitercunque & ubicunque ſpectantibus ſive pertinentiis, de nobis ſimiliter & hæredibus noſtris imperpetuum, ſicut prædictum eſt. Quæ quidem omnia Caſtr', Burg', Vill', Maner', & Honor', Stannar' & Cunag', firm' Exon', & Wallingford', terr', & tenementa, prout ſuperius ſpecificantur, ſimul cum feod', Advocac', & omnibus aliis ſupradictis, præfat' Ducatui præſenti Carta noſtra pro nobis & hæredibus noſtris annectimus & unimus eidem imperpetuum remanſur: Ita quod ab eodem Ducatu aliquo tempore nullatenus ſeparentur, nec alicui ſeu aliquibus aliis, quam dicti loci ducibus, per nos vel hæred' noſtros donentur ſeu quomodolibet concedantur; Ita etiam quod præfato duci ſeu aliis ejuſdem loci ducibus deceden', & filio ſeu filiis, ad quos dict' ducat', prætextu conceſſion' noſtrarum prædict' ſpectare dinoſcitur, tunc non apparentibus, idem Ducat' cum Caſtr', Burg', Vill', & omnibus aliis ſupradictis, ad nos & hæred' noſtros Reges Angliæ revertatur, in manibus noſtris & ipſorum hæred' noſtrorum Regum Angliæ retinend' quouſque de hujuſmodi filio ſeu filiis in dicto Regno Angliæ hereditar' ſucceſſur' appareat, ut eſt dictum, quibus tunc ſucceſſive ducat' illum cum pertin' pro nobis & hæredibus noſtris, concedim' & volumus liberari, tenend' prout ſuperius eſt expreſſum. Et quod idem dux, & dict' ipſius ac hæredibus ſuorum filii primogeniti, duces dicti loci, imperpetuum habeant liberam warrennam in omnibus dominicis terr' prædict', dum tamen terr' illæ non ſunt infra metas foreſtæ noſtræ: Ita quod nullus intret terr' illas ad fugand' in eis, vel ad aliquod capiend' quod ad Warr'

pertineat, ſine licentia & voluntate ipſi' ducis, & aliorum ducum ejuſdem loci, ſubforisfactur' noſtra decem librarum, ſicut prædictum eſt. Hiis teſtibus, venerabilibus patribus I. Cantuar' Archiepiſcopo toti' Angliæ Primat' Cancellar' noſtro, Henrico Lincoln' Epiſcopo Theſ. noſtro, Richardo Duneln' Epiſcopo, Johanne de Warrenna Comit' Surr', Thoma de Bello Campo Comit' War', Thoma Wake de Lydell, Johanne de Moubray, Johanne Darcy le Neven' Seneſchall' hoſpitii noſtri, & aliis. Dat' per manum noſtram apud Weſtmonaſter', decimo ſeptimo die Martii, Ann' Regni noſtri undecimo, per ipſum Regem, & totum Conſilium in Parliamento. Nos autem tenor' Cart' Record' & Act' Parliamenti prædict', ad requiſitionem dilecti & fidelis noſtri Tho. Stephens Armigeri Attorn' generalis prædilecti & prædilectiſſimi filii noſtri primogenit' Henrici Principis, ducis Cornub', duximus exemplificand' per preſentes. In cujus rei teſtimonium has literas noſtras fieri fecimus paten'. Teſte me ipſo apud Weſtm' quinto die Martii Anno Regni noſtri Angliæ, Franciæ, & Hiberniæ, tertio, & Scotiæ triceſimo nono, prout per prædictas literas paten' Exemplificationis prædict' hic in Cur' prolat' plenius liquet & apparet. Et prædict' Henricus Hobart Attornat' dicti domini regis nunc generalis, pro eodem domino Rege nunc dicit, & verificare vult, quod prædict' Actus Parliamenti in prædicto Parliamento prædict' nuper Regis Edwardi tertii editus, & prædict' Cart' per prædict' nuper Regem Edwardum tertium, Authoritate prædicti Parliamenti ejuſdem nuper Regis Edwardi tertii confect', in prædict' brevi de Scire fac' ſpecificat', & prædict' Act' Parliamenti in prædicto Parliamento prædict' nuper Regis Edwardi tertii edit', & prædict' Cart' per prædictum nuper Regem Edwardum tertium authoritate prædicti Parliamenti ejuſdem nuper Regis Edwardi tertii confect', unde in irrotulament' prædict' & in prædict' exemplificatione irrotulament' prædict', ut præfertur, fact' ſit mentio, ſunt una & eadem, & non alia neq; diverſa: Unde idem Attorn' dicti domini Regis nunc, pro eodem domino Rege hic, pet' judicium ſi prædict' Henr. Lindley ad dicendum, quod non habetur aliquod tale Record' talis Actus Parliamenti prædict' nuper Regis Edwardi tertii, nec aliquod tale Record' prædictæ Cartæ per eundem nuper Regem Edwardum tertium authoritate Parliamenti prædicti in brevi prædicto de Scire fac' ſpecificat', cont' prædictas literas paten' Exemplificat' prædict', hic in Cur' per eundem Attorn' dicti domini Regis nunc pro eodem domino Rege nunc prolat', admitti debeat. Et ulterius idem Henricus Hobart Attorn' dicti dom' regis nunc generalis pro eodem dom' rege nunc, pet' quod prædict' literæ paten' prædict' nuper Reginæ Elizabeth quoad prædict' Maner'

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de Weſt Taunton, Trelowia, & Landulph cum pertin', revocentur & adnullentur, quodq; præd' maner' de Weſt Taunton, Trelowia, & Landulph cum pertin', in man' dicti dom' regi nunc capiatur & ſeiſient'. Et præd' Hen. Hobart miles, Attorn' dicti dom' Regis nunc generalis, qui &c. quoad præd' placitum prædictor' Johannis Hele & Warwici Hele, per ipſos ſuperi' in forma præd' placitat', pro præd' dom' Rege dic', quo placitum illud materiaq; in eodem content minus ſufficien' in lege exiſtunt ad manutenend' quod prædictæ literæ paten' prædictæ nuper Reginæ Elizabeth de prædict' maner' de Weſt Taunton, Trelowia, & Landulph fact', revocari & adnullari, aut quod maner' illum cum pertin' in manus dicti domini Regis nunc ſeiſiri, non debeant: Ad quod quidem placitum modo & forma prædict' placitat', idem Attorn' generalis, pro eodem Domino Rege neceſſe non habet, nec per legem terræ tenetur reſpondere. Et hoc parat' eſt verificare: Unde pro defectu ſufficien' placiti prædictorum Johannis Hele & Warwici Hele in hac parte, idem Attorn' generalis, pro eodem dom' reg. pet' judicium quod prædictæ literæ patent' præd' nuper Reginæ Elizab. de præd', Maner' de Weſt Taunton, Trelowia, & Landulph cum pertin', fact', revocentur & adnullentur. Et quod maner' illa cum pertin in man' ejuſdem domini Regis capiantur & ſeiſientur, &c. Super quo prædictus Henricus Lindley dic', quod placitum prædict' Attorn' dict' domini regis generalis, pro eodem domin' Rege nunc ad placitum ipſius Henrici Lindley prædictum ſuperius replicand' placitat', materiaq; in eadem content', min' ſufficien' in lege exiſtunt, ad ipſum Henricum Lindley a dicend', quod non habetur aliquod tale Record' alicujus talis Actus Parliamenti præd' nuper Regis Edwardi tertii edit', qual' in prædicto brevi de Scire fac' inde recitatur & ſpecificatur, nec aliquod tale Record' prædictæ Cart' per eundem nuper Regem Edwardum tertium authoritate parliamenti prædicti confect', qual' in prædicto brevi de Scire fac' inde ſuperius recitatur & ſpecificatur, percludend': Quodq; ipſe idem Henricus Lindley ad placitum illud modo & forma prædict' ſuperius replicand' placitat' neceſſe, non habet, nec per legenterræ tenetur rejungere: Et hoc idem Hen. Lindley paratus eſt verificare, unde, pro defectu ſufficien' Replicationis in hac parte, idem Hen' Lindley, ut prius, pet' judicium ſi prædictæ literæ paten' prædictæ nuper Reginæ Elizabeth de præd' maner' de Weſt Taunton, Trelowia, & Landulph, cum pertin', fact', revocari ſeu adnullari, aut prædicta maneria de Weſt Taunton, Trelowia, & Landulph, cum pertin', vel eorum aliquod in manus dicti domini Regis nunc capi aut ſeiſiri debeant, &c. Et prædict' Johannes Hele & Warwicus Hele pro ſeipſis dicunt, quod ex quo ipſi

ſufficien' materiam in prædicto placito ſuo per ipſos ſuperius placitat' allegaver', viz. prædict' ſeiſinam prædictæ nuper Reginæ Elizabeth de prædictis Maner' de Weſt Taunton, Trelowia, & Landulph cum pertin', in dominico ſuo ut de feodo, in jure Coronæ ſuæ Angl', ac Conceſſion' prædictam inde per prædict' literas paten' ipſius nuper Reginæ, ac reſid' mater' per ipſos ſuperius placitat', quam prædict' Johannes & Warwicus parat' ſunt verificare, quam quidem materiam prædict' Attornat' dicti domini Regis non dedicit, nec ad eam aliqualiter reſpondit, ſed verificationem illam admittere omnino recuſat, ut prius petit judicium ſi prædictæ literæ paten' prædictæ nuper Reginæ Elizabeth de prædict' maneriis de Weſt Taunton, Trelowia, & Landulph, cum pertinen', fact', revocari aut adnullari, aut maner' illa cum pertinentiis vel eorum aliquod in manus ejuſdem domini Regis nunc capi aut ſeiſiri debeant. Et ulterius pro meliore informatione, & ad plenius informandum dictum dominum Regem nunc, & Cur' hic de ſtatu dicti domini Regis nunc ad prædict' Ducat' Cornubiæ, & ad alia Maner' eidem nuper Ducatui quo modolibet modo pertinen' ſive annex', ſeu parcell' inde exiſten', iidem Johannes & Warwicus dicunt, quod in Statuto, in parliamento domini Henrici nuper Regis Anglæ ſeptimi, tent' apud Weſtmonaſter' in comitat' Middleſexiæ ſeptimo die Novembris Ann' Regni ſui primo, edit', (inter alia) ordinatum, inactitatum, & ſtabilitum fuit authoritat' ejuſdem Parliamenti, Quod dictus dominus Rex Henricus ſeptimus haberet, teneret, gauderet, & poſſideret, ſibi & heredibus ſuis imperpetuum, a viceſimo primo die Auguſti tunc ultim' præterito, prædict' Ducat' Cornubiæ, ac omnia Honor', Caſtra, Dominia, Maner', terr', ten', redd', reverſiones, ſervic', poſſeſſiones, Advocationes, & al' hereditament', cum omnib' membris & pertin' prædict' Ducat' ſpectan' & pertinen', aut quæ fuer' pertinen', annex', reputat', aut capt' parcell' ejuſdem, ullo tempore Regnorum Henrici ſexti, Edwardi quarti, nuper Regum Angliæ in tam amplo & largo modo, cum omnibus libertat', & fraunchefiis, & aliis rebus eidem ſpectantibus, in ſimil' modo, forma, & conditione, prout prædict' Reges aut eorum alter habuer', tenuer', occupaver', uſi fuer', & gravaſi fuer', aut habuit, tenuit, occupavit, uſus fuit, & gaviſ' fuit in eiſdem, aliquo tempore duran' dictis Regnis ſuis, prout in ſtatuto prædicto in Anno Regni prædicti nuper Regis Henrici ſeptimi primo ſupradicto (inter alia) plenius continetur & apparet. Per quod idem dominus Jacobus nunc Rex fuit & adhuc exiſtit ſeiſit' de reſid' Manerior', terr' & ten' prædict' Ducat' Cornubiæ pertinen', per prædict' nuper Reginam

Reginam Elizabeth non alienat' in dominico ſuo ut de feodo, in jure Coronæ ſuæ angliæ, unde petunt quod cur' hic cognitionem & notitiam de prædicto ſtatuto in anno regni prædicti nuper Regis Henrici ſeptimi primo ſupradict' edit', ac de prædict' ſtatu dicti domini Regis nunc ad reſid' maner', terr', ten', & hereditamen' prædict' ducat' Cornub' pertin', caper' & accipere velit, &c. Et prædictus Henricus Hobart miles, Attorn' dicti domini Regis nunc generalis, qui, &c. Quoad hoc unde prædictus Henricus Lindley, ſuperius moratur in lege, ex quo ipſe ſufficien' materiam in lege pro eodem domino Rege ad præcludend' præfat' Henricum Lindley, a dicendo, quod non habetur aliquod tale Record' alicujus talis actus Parliamenti prædict' nuper Regis Edwardi tertii edit', qual' in prædict' brevi de Scire fac' inde recitatur & ſpecificatur, nec aliquod tale Record' prædictæ cartæ per eundem nuper Regem Edwardum tertium, authoritate parliamenti prædict' confect', qual' in prædicto breve de Scire fac' inde ſuperius recitatur & ſpecificat', ſuperius allegavit, quam quidem materiam præd' Henricus non dedic', nec ad eam aliqualit' reſpond', ſed verificationem ill' admittere omnio recuſat': idem Attornat' dicti domini Regis generalis, ut prius, pro eodem domino Rege nunc petit judicium, & quod prædictæ literæ paten' prædictæ nuper Reginæ *Elizabeth* de prædict' maner' de Weſt Taunton, Trelowia, & Landulph, cum pertin' fact', revocent' & adnullent'. Ac quod maner' ill' cum pertinen' in manus dicti domini Regis nunc capiantur & ſeiſient', &c. Et quia cur' dicti domini Regis nunc hic ſe adviſare vult de & ſuper præmiſſis prædict' antequam ad judicium ſuperinde reddend' procedat', dies inde dat' eſt tam præfato Henrico Hobart militi, Attornat' dicti domini Regis nunc generali, qui, &c. quam præd' Henrico Lindley, Johanni Hele, & Warwico Hele, coram dicto domino Rege nunc in dicta cur' hic, uſque in Octabis Sancti Hillarii proxim', &c. ubicunque, &c. de audiend' inde judicio ſuo, Eo quod dict' cur' hic inde nondum, &c. Ad quas quidem Octab' S. Hillarii coram dicto domino Rege nunc in dicta cur' hic, ſcilicet apud Weſtm' prædict' ven' tam prædictus Henricus Hobart miles, Attorn' dicti dom' Regis nunc general', qui, &c. in propria perſona ſua, quam prædict' Henricus Lindley, Joh' Hele, & Warwicus Hele, per Attorn' ſuum prædict'. Et ſuper hoc idem Attorn' ipſius dom' Regis nunc general', pro eodem dom' Rege nunc, ut prius, pet' judicium, & quod præd' literæ paten' de præd' maner de Weſt Taunton, Trelowia, & Landulph prædict' cum pertin' in forma prædict' fact' revocent' & adnullentur: Ac quod maner' illa cum pertin' in manus dicti dom' Regis nunc capiant' & ſeiſient', &c. Et quia dict' cur' dicti dom' reg' nunc hic ſe ſuperind' ult' adviſ. vult priuſq' ad judic' inde red'

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procedatur, dies ulterius inde datus est tam prefato Henrico Hobart mil', Attornat' dicti domini Regis nunc generali, qui, &c. quam predict' Henrico Lindley, Johanni Hele, & Warwico Hele, hic usque in quinden' Paschæ proxim', &c. ubicunque, &c. de judicio suo inde audiend', Eo quod dicti tur' dicti domini Regis nunc hic inde nondum, &c.

Casus

Casus Principis.

DOminus Rex, ad petitionem illustrissimi principis Henrici, filii sui primogeniti, Ducis Cornubiæ, prosecutus est breve de Scire facias versus Henricum Lindley militem & Johannem Hele Servientem ad Legem, ad revocandum literas patentes nuper Reginæ Elizabeth, datas secundo die Maii anno regni sui tricesimo septimo (per quas dicta Regina concessit dicto Henrico Lindley & cuidam Gellio Mericke, (jam defuncto) & heredibus suis maneria de West Taunton, Trelowia, & Landulph in com' Cornub') in eadem maner' præf. Duci

The Prince's Case

THE King, at the Petition of the most Noble Prince HENRY, his first begotten Son, Duke of Cornwall, brought a (a) Scire facias against Henry Lindley, Knight, and Serjeant Hele, to repeal Letters Patents of the late Queen Elizabeth, bearing Date the 2d of May, in the 37th Year of her Reign, by which the Queen granted to the said H. Lindley, and to one Gelly Mericke (now dead) and their Heirs, the Manors of West Taunton, Trelowia and Landulph, in the County of Cornwall, to the End the King might make Livery of them to the said Duke, as Members and

(a) 1 Rolls 192.

and Parts of the Dutchy aforesaid, and that by Force of three Acts of Parliament, two in 11 E. 3. whereof the one is in Form of a Charter by Authority of Parliament, by which the Prince was created Duke of Cornwall, and the Possessions of the Dukedome of Cornwall thereby given to him, with special Limitation, and the Possessions annexed to the said Dutchy, so as they shall not be severed, with special Clause of Revivification, altho' the special Limitation at any Time should cease, &c. and of the Act of 32 H. 8. by which the three Manors are made Parcels of the Dutchy of Cornwall for ever to all Intents and Purposes, &c. The Sheriff return'd Sir Henry Lindley, and Serjeant Hele, and one Warwick Hele, Knt. Terre-tenants of the said three Manors summoned; and after four Imparlances, Sir Henry Lindley, as to the said two several Acts of Parliament, Anno 11 E. 3. severally pleaded Nul tiel record: Serjeant Hele and the said Warwick pleaded the said Letters Patents of Q. Elizabeth with a non obstante the said Act of 32 H. 8. and conveyed to themselves a joint Estate, to them, and to the Heirs of the said Serjeant; and further pleaded the Act

tanquam membra & parcellas Ducatus prædicti liberati faceret: Et hoc vigore 3. statutorum Parliamentariorum, scilicet duo um anno undecimo Edwardi tertii editorum; (quorum unum habet formam Chartæ authoritate Parliamenti factæ, per quod Princeps in ducem Cornubiæ præfectus fuit, ejusdemque Ducatus possessiones illi datæ cum speciali limitatione, & sic Ducatui antedicto annexæ quod ab eo separari minime possunt: idque cum speciali clausula Revivificationis, licet quandoque specialis illa cessaret limitatio, &c) Tertiis vero statuti anno 32. Henrici 8. per quod dicta illa maneria deveniunt parcell' Ducat' Cornubiæ imperpetuum ad omnia proposita & intentiones, &c. Vicecomes returnat' dictos H. Lindley, & Jo. Hele, & quendam W. Hele mil', terr' tenentes prædict' trium maner', esse summonitos. Et post quatuor ad interloquendum dies datos, Hen. Lindley, quoad præd' duo Parl' statuta, an. 11 E. 3. separat' placit', quod nullum tale hab' record': J. Hele, & Warw. anted' respond' allegant dict' reg' Eliz. liter' patent' cum clausul. de Non obst' præd' stat' de an' 32 H. 8. ostend' seipsos conjunct' esse feoffat' ad solu' sui propriu' usum, & hær' ejusd' J. Hele:

Actum

Actum insuper allegant confirmationis literarum patentium ad parliament' an' 43 reginæ Eliz. edit'. Et quoad pl'ita Hen. Lindley, attorn' reg' replicando dic', & profert (per inspexim') dict' chartæ de an' 11 E. 3. exemplificationem sub mag' no angliæ sigil' prout in recordo, i. actis publicis, ubi intratur in hæc verba: Et pet' jud', si, contra hanc exemplificat', ad dicendum, nullum tale record', admitti debeat. Et super placito dicti J. Hele & Warw. dict' att' moratur in lege: Et illi sil. dicti Joh & War' sil'ter. Et ulter', ut amici cur', ad informand' cur' de verit' & de statu regis in residuo dict' maner' parcell' dicti ducat', repet' cur' partem statuti an' 1 H. 7. editi de antedict' duc' Cornub'. Et super replicatione Attornati generalis dict' Henr. Lindley moratur in lege: Et ille, scilicet dict' atttorn', sil'ter. Re' hoc tantummodo compend' retuli, eo, quod latius totam ex record' adjeci: Et si casum etiam fusius dicere, prolixanimis (ut casus hic se habet) hæc esset relatio.

In hac causa 4 motæ fuerunt quæst' considerat' dignæ. 1. Si instrum' fact' 17. die Martii an' 11 E. 3. principi Ed. sit charta tempore parliamenti fact' vel charta authoritate parliamenti stabilita. Et sum' totius litis in hoc articulo constituta est.

of Confirmation of Letters Patents at the Parliament held 43 Eliz. And as to the Pleas of Sir Henry Lindley, the King's Attorney reply'd and shew'd an Exemplification by Inspeximus of the said Charter of 11 E. 3. under the Great Seal, (as in the Record where it is enter'd in hæc verba) and demanded Judgment if against the same he should be admitted to plead Nul tiel record. And demurred in Law upon the Plea of Serjeant Hele and Warwick, who joined with him. And further, ut amici Curiæ, and to inform the Court of the Truth, and of the State which the King, that now is, hath in the Residue of the said Manors, Parcel of the said Dutchy, they repeated to the Court Part of the Act of 1 H. 7. concerning the said Dutchy of Cornwall. And H. Lindley demurred in Law upon the Replication of the Att. General, with whom the Attorney joined. The Reason why I have made an Abstract of the Case, so compendious, is because I have added the whole Record at length, and if the Case should be also put at large, it would extend as this Case is to an unnecessary Prolixity. In this Case four Quest. were moved worthy of Consid. 1. If the Instr. made 17 Mar. an. 11 E. 3. to P. Edw. be a Charter made in Time of Parl. or a Charter establ. by Auth. of Parl. and this is the princip. and funda. P'nt on w'ch the whole depen.

2. If

2. If there was any other Act of Parliament but the said Charter; and if there is no other Act, if the King's Writ be good which alleges another Act. 3. Admitting the Prince to be Duke of Cornwall, what Estate has the Prince in the Honour and Dukedome of Cornwall? and how has it he? by Descent or by Purchase? For if the Prince has but a particular Estate, then, after the particular Estate ended, the said Serjeant Hele and his Heirs shall have the said Manors until, &c. And then a special Judgment ought to be given, with a Quoad, &c. and no general Judgment that the Letters Patents shall be void, nor the Inrolment cancelled. 4. If against such Act of Parliament Nul tiel record may be pleaded. And the Lord Chancellor, because the Cause was of great Importance and Consequence, assisted himself with a Judge of each of the Courts at Westminster, scil. Coke, Chief Justice of the Common Pleas, Fleming Chief Bazon of the Exchequer, and Williams one of the Judges of the King's Bench, (for Sir John Popham, Knight, late Chief Justice of the King's Bench, who was called to it, and heard some of the Argu-

2. Si præter dictam Chartam aliquod fuer' aliud statutum parliam': & si non sit, cujus deniq; valoris sit breve dom' reg', in quo alterius mentio est stat'. 3. Si admittatur principem fuisse duc' Cornub', quem habet princeps statum in dicto honore & ducatu Cornub'; & quonam habet modo, scil' per descensum, vel per acquisitionem: si enim princeps habeat solummodo particul' stat', tunc post particul' statum finitum dict' Jo. Hele, & hæred' sui haber' maner' præd' quousque, &c. & tunc judicium debet esse speciale cum Quoad, &c. & non gener', quod irritæ sint dict' liter' patent', & eorundem irrotulament' cancelletur. 4. Si contra tale parliamenti staturum nullum tale record' possit allegari. Et domin' cancellarius in re tanta tantiq; momenti, e singulis Westmonaster' tribus curiis unum sibi associavit Judicem, scilicet, Coke capitalem Justiciarium de Banco, Fleming capitalem Scaccarii Baronem, & Williams unum Justiciariorum ad placita coram Domino Rege tenenda assignatum (Dominus enim Joh. Popham miles nuper Capitalis Justiciarius, qui huc evocatus fuit, & argumento-

rum

rum nonnulla ad Barram audiverat, diem clausit extremum pendente Placito.) Et hæc causa scite ad Barram argumentata fuit per Stephens, princ' attor' pro rege, & per Heron Servient' ad legem pro defendent'; & secunda vice p' Dodderidge solicitatorem regis generalem, & per Houghton servientem ad legem pro defendentibus; & deinde per Hobart generalem regis attornatum: Et postea isto eodem termino causa hæc per Williams & capitalem Baronem prima vice discepta fuit; & per capitalem Justiciarium de Banco & Dominum Cancellar' vice secunda. Et quoad Articulum primum, uno assensu determinatum fuit per Cancellarium & dictos Justiciarios, quod dicta Charta facta fuit authoritate Parliamenti. Et quoniam *Duo sunt instrumenta ad omnes res aut confirmandas, aut impugnandas, Ratio & Authoritas*, suas firmarunt opiniones, 1. Ratione, 2. Ex legis Authoritate. Quoad primum duas afferunt rationes *ex visceribus causæ*, primam *ex impossibili*; & hoc tribus de causis. 1. Impossibile foret, si dicta Charta non fuerit Parliamento stabilita, statum, vel honoris præf. in duc' Cornub', vel possess. ind', isto special' modo

ments at the Bar, dyed pendente placito.) And this Case was argu'd very well at the Bar, by Stephens the Prince's Attorney, for the King, and by Heron Serjeant for the Defendants; and at another Day by Doddridge the King's Solicitor, and by Houghton Serjeant for the Defendants; and, lastly, by Hobart the K's Attorney General. And afterwards, the same Term, the Case was argued by Williams and the Chief Baron in one Day; and at another by the Chief Justice of the Common Pleas and the Lord Chancellor. And as to the first Point, it was unanimously resolv'd by the Lord Chancellor and the said Justices, That the said Charter was made by (a) Authority of Parliament. And because Duo sunt instrumenta ad omnes res aut confirmandas, aut impugnandas, Ratio & Authoritas; They confirmed their Opinions, 1. by Reason, and then by Authorities in Law. For the first they gave two Reasons, ex visceribus causæ, 1. Ex impossibili, and that for three Causes: 1. It would be impossible if the said Charter was not establish'd by Parliament, that the Estate, either of the Honour to be Duke of Cornwall, or of the Possessions thereof being limited in such special Manner as it is, should be sufficient in Law. For the Limitat. of both

1. Point. Co. Lit. 81. 2. 98. b.

(a) 1 Jon. 104.

is,

(a) Jenk. Cent. is (a) Habendum & tenendum eidem Duci, & ipſius & hæredum ſuorum Regum Angliæ filiis primogenitis & dicti loci Ducibus, in regno Angliæ hæreditarie ſucceſſuris. So that he who ought to inherit by Force of this Grant, ought to be the firſt begotten Son and Heir apparent of the King of England, and of ſuch King as is Heir to Prince Edward, and that ſuch firſt begotten Son and Heir apparent to the Crown ſhall inherit the Dukedom in the Life-time of the King his Father. So that if there be K. Grandfather, Father and Son, now the Father being the firſt begotten Son of the Grandfather is Duke of Cornwall in the Life of the King, and eo inſtante that the Grandfather dies, the Father is King, and eo inſtante alſo the Son is Duke of Cornwall; which Courſe of Inheritance being againſt the Rules of the Com-

(b) Co. Lit. 27. a. mon Law, (b) cannot be created by Charter without the Force and Strength of an Act of Parliament. And in this Caſe the King's eldeſt Son

(c) Co. Lit. 16. a. has (c) this Dignity by Right of Inheritance, in like Manner as the eldeſt Sons of Grandees and Peers of the Realm who have ſupereminent Dignities in them, have in Appellation and Curteſy only; as ſuppoſe the Grandfather be a Bazon, Father and Son, and the King creates the Grandfather an Earl, eo inſtante the Father is a Bazon in Appellat. & Curteſy, & eo inſtante that the Grandfath. dies,

do limitatarum quo h
ſunt, fore ſufficient' in le
ge; ambor' enim limitati
eſt. *Habendum & tenen*
dum eidem Duci, & ipſi
& hæredum ſuorum Regu
Angliæ filiis primogeniti
& dicti loci Ducibus, i
Regno Angliæ hæreditari
ſucceſſuris. Ita quod hunc
qui hæreditare debet vir
tute hujus conceſſionis, o
portet eſſe filium primo
genitum & hæredem ap
parentem Regis Angliæ
immo hujuſmodi Regis qu
hæres eſt dict' Principi Ed
wardo; & quod primoge
nitus ille filius & hæres co
ronæ apparens jure hære
ditario haberet dictum du
cat', vivente Rege ſuo pa
tre: utputa ſit Rex avus
pater, & filius, hic pate
(primogenitus exiſtens fil
us avi) eſt dux Cornubi
vivente Rege; & eo in
ſtante quo avus decedit p
ter eſt Rex, & eo etiam in
ſtante filius eſt dux Cornub
qui hæred' ordo, cum
contra regulas legis co
munis, creari non pot
charta, ſtat' parliament' vi
& vigore non adhibitis.
in hoc caſu filius Regis na
maximus hanc habet dign
tatem jure & hæred', eode
modo quo filii natu ma
mi Primatum & Proceru
Regni (quorum ſuperem
nentes ſunt dignitates) h
bent appellat' & urbanita
tant'; utputa ſit avus baro
pater, & filius, & Rex avu
creat' in comit', eo inſtan
pater eſt baro appellat' & u
banitate, & eo etiam inſtan

arus decedit, pater eſt
& filius Baro urba-
: Et ſic de ſimilibus.
poſſibile, foret poſſeſ-
Ducatus ſic eſſe an-
dicta charta, eodem
prout charta in ſe
; clauſula enim Con-
nis eſt: *Quæ quidem*
Caſtra, Burg', Vill',
ria, &c. prædicto Duca-
ſenti charta noſtra pro
& hæredibus noſtris an-
mus & unimus eidem im-
tuum remanſur', ita quod
dem Ducatu aliquo modo
tenus ſeparentur, nec a-
ſeu aliquibus aliis, quam
loci Ducibus per nos vel
des noſtros donentur, ſeu
dolibet concedantur',
indiſſolubilis & inſe-
bilis Connexio tali mo-
fieri non poteſt charta
m, Parliamenti ſtatu-
n adhibito. 3. Impoſ-
foret, legis regula, ſta-
in terra ceſſare & rur-
reviviſcere (ſicut clau-
Revivificationis inten-
charta tantum: quæ clau-
eſt, *Ita quod præfato Du-*
aliis ejuſdem loci Duci-
decedent', & filio ſeu filiis,
quos dictus Ducatus prætex-
Doni & Conceſſionis no-
prædictorum ſpectare
noſcitur, tunc non apparen-
idem Ducatus cum Ca-
Burg', Villis, &c. ad
vel hæredes noſtros Reges
ia revertatur, in mani-
ſtris & ipſorum hæredum
rum Regum Angliæ reti-
quouſque de hujuſmodi

dies, the Father is Earl, and the Son Baron by Curteſy: & ſic de ſimilib'. 2. It would be impoſſible that the Poſſeſſions of the Dutchy ſhould be ſo annexed by the Charter in the ſame Manner as the Charter purports; for the Clauſe of Anneration is, Quæ quidem omnia Caſtra, Burg', Vill', Maneria, &c. præd' Ducatui præſenti, Charta noſtra pro nobis & hæredibus noſtris annectimus & unimus eidem imperpetuum remanſur', ita quod ab eodem Ducatu aliquo modo nullatenus ſeparentur, nec alicui ſeu aliquibus aliis, quam dicti loci Ducibus per nos vel hæredes noſtros donentur, ſeu quomodolibet concedantur: Which indiſſoluble and inſeparable Anneration cannot be made in ſuch Manner by Charter only, without Act of Parliament. 3. * It would be impoſſible by the Rule of Law, That an Eſtate in Land ſhould ceaſe and revive again, as by the Clauſe of Revivification is intended, by Charter only; which Clauſe is, Ita quod præfat' Duce, ſeu aliis ejuſdem loci Ducibus decedent', & filio ſeu filiis, ad quos dictus Ducatus prætextu Doni & Conceſſionis noſtrorum prædictorum ſpectare dignoſcitur, tunc non apparentibus, idem Ducatus cum Caſtris, Burg', Villis, &c. ad nos vel hæredes noſtros Reges Angliæ revertatur,

* Co. Lit. 27. a.
1 Co. 87. a. b.

tatur, in manibus noſtris & ipſorum hæredum noſtrorum Reg' Angliæ retinend', quouſque de hujuſmodi filio ſeu filiis in dicto regno Angliæ hæreditarie ſucceſſur' appareat, ut dictum eſt, quibus tunc ſucceſſive Ducatum illum cum pertinentiis, pro nobis & hæredibus noſtris concedimus & volumus liberari, tenend' prout ſuperius eſt expreſſum. For altho' a (a) Kent newly created (to which no Man can have an antient Right) may ceaſe for a Time, and revive again, yet Land, which is of a more ſolid Nature, and to which another may have an antient Right, cannot ſo do, as it is reſolved in Corber's Caſe, in the firſt Part of my Reports.

(a) 1 Co. 87. a. 130. a. Perk. Sect. 327. Plowd. 156. a. 10 H. 7. 13. b. 5 E. 2. Dower 143. 12 E. 3. Condit. 11. 22 E 3. 19. a. 4 Leon. 83. 6 Co. 41. a. 8 Co. 17. b.

The ſecond Reaſon was, ex abſurdo, That if others being created Earls at the ſame Time for the Honour of the Prince, all their Creations and Donations ſhould be firm and good in Law to ſome of them and the Heirs of their Bodies; and to others in Fee-ſimple; and that the Creation of the Prince himſelf, and of ſuch a moſt noble Prince, and the Grant to him of the ſaid Caſtles, Manors, &c. ſhould be either void in Law, or but an Eſtate at Will; and eſpecially in ſuch a Time when the Judges (who always attended the Parliament) were the moſt wiſe and learned in the Law.

It remains then to ſee what Authorities and Precedents there are in Law to prove the ſaid Charter has the

filio ſeu filiis in dicto Regno Angliæ hæreditarie ſucceſſur' appareat ut dictum eſt, quibus tunc ſucceſſive Ducatum illum cum pertinentiis pro nobis & hæredibus noſtris concedimus, & volumus liberari: tenendum prout ſuperius eſt expreſſum. Quanquam enim redditus de novo creatus (ad quem nullus homo haber' poteſt jus ſuperius) pro tempore ceſſare poteſt & rurſus reviviſcere, terra tamen (quæ ſolidioris eſt naturæ, & ad quam alter habere poteſt jus ſuperius) ita facere non poteſt, ſicuti determinatum eſt in caſu *Corbet* in prima Relationum mearum parte.

Secunda ratio fuit *ex abſurdo*, eo quod, cum eodem tempore ſex alii fuerint creati Comites in honorem Principis, illorum omnes creationes & donationes firmæ forent & in lege validæ quibuſdam eorum & hæredibus de corporibus ſuis exeuntibus, & aliis in feodo ſimplici, creatio vero Principis ipſius, Principiſque tam celeberrimi, & conceſſio dictorum caſtrorum maneriorum, &c. in lege forent invalidæ, vel de ſtatu tantum ad voluntatem, & hoc tunc temporis quando fuerunt Judices (qui ſemper attendunt Parliamentum) optime eruditi & Juriſperitiſſimi.

Videre deinde eſt quæ ſunt in lege Authoritates & exempla ad probandum dict' chartam in ſe haber

vir

vim ſtatut' Parliamentarii. Et hoc quadrupliciter probatum fuit: 1. Ex ipſa charta & ex authoritatibus in lege cum hac concurrentibus: 2. Ex conceſſionibus & ſtatibus per Principem factis, & ſub literis patentibus Regum: 3. Judiciis ſecundum uſitatum Legis modum latis, & Determinationibus Judicum in Curiis Regiis: 4. Determinationibus in Parliamento per Regem & totum corpus Regni. 1. In ipſa charta facta Principi duæ clauſulæ fuerunt obſervatæ: 1. In principio Chartæ dictum eſt, *Conſiderationis noſtræ intuitus ad perſonam dilecti & fidelis noſtri Edwardi, Comitis Ceſtriæ, filii noſtri primogeniti, intimos convertentes, volenteſque perſonam ejuſdem honorari, eidem filio noſtro nomen & honorem Ducis Cornubiæ de communi aſſenſu & conſilio Prælatorum, Comitum, Baronum, & aliorum de conſilio noſtro in præſenti Parliamento convocat' exiſtent', Dedimus &c.* Ex quo manifeſtum eſt dictam chartam authoritate Parliamenti factam fuiſſe. Et determinatum fuit hanc clauſulam in omnes chartæ partes ſe extendere: quæ clauſula per ſe fuiſſet ſufficiens. 2. In concluſione & fine chartæ (quæ recordi eſt parcella) dict eſt, *Datum per manum noſtram apud Weſtmonaſt' 17. die Martii A. Reg.*

Force of an Act of Parliament. And that was proved four manner of Ways. 1. Out of the Charter itſelf, and Authorities in Law agreeing to it. 2. By Grants and Eſtates made by the Prince, and by Letters Patents of Kings. 3. By Judgments given according to the ordinary Courſe of Law, and Reſolutions of the Judges in the King's Courts. 4. By Reſolutions in Parliaments by the King and the whole Body of the Realm. 1. In the Charter itſelf made to the Prince, two Clauſes were obſerved, 1. In the Beginning of the Charter it is ſaid, Conſiderationis noſtræ intuitus ad perſonam dilecti & fidelis noſtri Edwardi, Comitis Ceſtriæ, filii noſtri primogeniti, intimos convertentes, volenteſque perſonam ejuſdem honorari, eidem filio noſtro nomen & honorem Ducis Cornubiæ de communi aſſenſu & conſilio Prælatorum, Comitum, Baronum, & aliorum de Conſilio noſtro in præſenti Parliamento convocat' exiſtent' Dedimus, &c. * By which it appears, That the Charter was made by Authority of Parliament. And it was reſolved, That this Clauſe extends to all the Parts of the Charter, which Clauſe of itſelf had been ſufficient. 2. In the Cloſe and End of the Charter, which is Parcel of the Record, it is ſaid, Dat' per manum noſtram apud Weſtm. 17 die Martii

* Co. Lit. 81. a. 98. b.

Martii, anno regni nostri 11. Per ipsum Regem & totum Consilium in Parliamento. Which also proves that it was made by Authority of Parliament. And it was more for the Honour of the King that the Creation and Donation should be in the Form of a Charter, and that Witnesses should be called to it, so that nothing should be omitted which belonged to a compleat Charter, and so principally to proceed from the King, as the Fountain of all Honour and Dignity; than if the Creation and Donation had been only by Act of Parliament; in which all would be Donors. Note Reader, If Letters Patents pass by Bill signed without Privy Seal, the Patent is subscribed, per ipsum Regem, (and then the Bill signed remains with the Chancellor for his Warrant:) and when it passes by Bill signed, and by Privy Seal also, then the Privy Seal remains with the Chancellor, and the Bill signed remains with the Clerks of the Signet, and the Lord Privy Seal has an Extract thereof to make the Privy Seal, and then the Letters Patents are subscribed, per Breve de Privato Sigillo: And if authoritate Parliamenti be added, then it passes according to the Act of 27 Hen. 8. cap. 11. And when the King Signs the Patent itself in the upper Part, and the Signature and Great Seal go together, then it is subscribed, Per ipsum Regem manu sua propria.

nostri undecimo, per ipsum Regem & totum Consilium in Parliament': quo etiam probatur illam fuisse factam authoritate Parliamenti. Et in majorem fuit Regis honorem quod creatio & donatio foret in forma Chartæ, & testes ad hanc advocati, (ut nihil omitteretur quod ad perfectam spectat Chartam) & sic præcipue e Rege, veluti e fonte totius honoris & dignitatis, emanaret, quam si creatio & donatio fuisset statuto Parliamentario tantum, in quo omnes essent donatores. *Nota* Lector, si literæ patentes exituræ sint sub billa signata, & non sub sigillo privato, subscribuntur, *Per ipsum Regem* (& tunc billa illa signata manet Cancellario in warrantum.) Et quando exituræ sunt sub billa signata & sub sigillo etiam privato, tunc privatum sigillum manet Domino Cancellario, & billa signata manet Clericis signaturæ, & ex hac allatum est Domino privati sigilli extractum ad faciend' breve de privato sigillo: & tunc literæ patentes subscribuntur, *Per breve de privato sigillo*; & si hæc verba (scilicet, *authoritate parliamenti*) apponantur, tunc exeunt secundum statutum de Anno 27 H. 8. cap. 11. Et quando Rex signat literas ipsas patentes in superiori parte, & signatura & magnum sigillum paribus passib' incedunt uno & eodem tempore, tunc subscribuntur; *Per ipsum Reg' manu sua propria.*

Et

Et quando authoritate & aſſenſu Parliamenti conficiuntur, tunc ſubſcribuntur, *Per ipſum Regem & totum Conſilium in Parliamento*, vel in hujuſmodi effectum. Et ſcire eſt, quod priſcis temporibus, tam quando terra, immunitas, ſive hæreditamentum de Rege transferebat' de ſtatu hæreditario, quam in creatione cujuſquam ad honorem & dignitatem, per literas patentes, concluſio fuit, *Hiis teſtibus.* A diu vero, pro terris, immunitatibus, vel hæreditamentis hæc formula intermiſſa fuerit, & nunc, & ſic a diu, literæ patentes concluduntur, *Teſte meipſo* &c. At in omnib' ad honorem & dignitatem creationibus, per literas patentes, antiqua formula (ſcilicet, *Hiis teſtibus*) manet uſque in hodiernum diem. Et quod dictus Parliamenti editi fiunt ſub formula Char' Reg' multa nobis in Lege ſunt monimonia. Primo, Magna Charta, edita 9 H. 3. cujus principium eſt, *Imprimis conceſſimus Deo & hac præſenti Charta noſtra confirmavimus pro nobis & hæredibus noſtris imperpetuum. &c.* concludit, *Hiis teſtibus &c.* &, *Datum per manum noſtram*, ut hujus etiam Chartæ concluſio eſt. Et quamvis in charta non liqueat, verbis expreſſis, quod facta fuit authoritate Parliamenti, quia tamen diverſæ ejus partes Legem communem & invertunt & mutant (quod charta tantum facere non poteſt) & patet ex capite ultimo, qd'

And when it is made by Authority and Conſent of Parliament, then it is ſubſcribed, Per ipſum Regem, & totum Conſilium in Parliamento, **or to the like Effect. And it is to be known, That in ancient Times, as well when any Land, Franchiſe or Hereditament, did paſs from the King of any Eſtate of Inheritance, as in the Creation of any to Honour and Dignity by Letters Patents, the Concluſion was with** (a) *Hiis teſtibus:* **But of long Time for Lands, Franchiſes or Hereditaments, this Form has been diſcontinued, and now, and ſo it hath been of long Time, the Patent concludes,** (b) *Teſte meipſo*, &c. **But in all Creations to Honour and Dignity by Letters Patents, the ancient Form of Concluſion of** *Hiis teſtibus* **is continued to this Day; and that Acts of Parliament do go in the Form of the King's Charter, we have many Examples in Law.** 1. (c) Magna Charta, **made** 9 Hen. 3. **which begins,** Imprimis, Conceſſimus Deo, & hac præſenti Charta noſtra confirmavimus pro nobis & hæredibus noſtris imperpetuum, &c. **and the Charter concludes with** Hiis teſtibus, & Datum per manum noſtram, **as ours doth: And although it doth not appear in the Charter itſelf by expreſs Words, that it was made by Authority of Parliament, yet becauſe many Parts of it croſs and change the Com. Law, which a Charter alone cannot do, and it appears by the laſt Chapter,**

(a) Co. Lit. 7. a. 2 Inſt. 77, 78.

(b) Co. Lit. 7. a. 2 Inſt. 77.

(c) Co. Lit. 81. a. 2 Inſt. 78.

That for the said Grand Charter, Archiepiscopi, Episcopi, Abbates, Priores, Comites, Barones, Milites, liberi tenentes, & omnes de regno nostro dederunt nobis quintodecimam partem omnium mobilium suorum: This Clause in the Conclusion of the Charter, proves it by Implication to be an Act in (a) Form of a Charter. And lastly, it hath always had the Allowance of an Act of Parliament, and therefore ought to be so taken; which is a stronger Case than ours is, for here are full and express Words; and Anno 21 H. 3. brev. 881. in the Earl of Chester's Case, the 11 Chapter of Magna Charta, Quod Communia Placita non sequant' Curiam nostram, is cited to take away the Jurisdiction of the King's Bench; and this Grand Charter hath been allowed and confirmed above (b) thirty Times by Acts of Parliament. So the Act of 21 H. 3. de anno Bissextili begins, Rex Justiciariis suis de Banco, &c. in the Form of a Patent or Writ. The Statute of Protections Anno 33 E. 1. de conjunctim feoffatis, Anno 34 E. 1. which begins, Rex omnibus ad quos, &c. and concludes, In cujus rei testimonium has Literas nostras fieri fecimus Patentes Teste, &c. So the Stat. de Artic' Cleri 9 E. 2. begins. E. Dei gratia &c. Omnibus ad quos &c. and concludes, In cujus, &c. Teste, &c. Two Statutes made Anno 14 E. 3. one pro Clero, and the other concerning England, that it should not be in Subjection

(a) 2 Inst. 78.

(b) Co. Lit. 81. a.

pro dicta Magna Charta *Archiepiscopi, Episcopi, Abbates, Priores, Comites, Barones, Milites, Liberi tenentes, & omnes de Regno nostro dederunt nobis quintodecimam partem omnium mobilium suorum:* hæc clausula in conclusione Chartæ implicite probat illam esse Actum sub Chartæ formula: Semper denique habuit approbationem Actus Parliamenti ideoque sic haberi debet qui casus nostro fortior est hic enim plena & expressa sunt verba: Et 21 Hen' titulo Breve 881. in causa Comitis Cestriæ, undecimum caput Magnæ Chartæ *Quod communia placita non sequantur Curiam nostram* citatur, ad Jurisdict' Banci Regii tollendam: Et hæc Magna Charta approbata & confirmata fuerit statutis Parliamentariis supra triginties. Item, Actus de an. 21 Hen. 3. de an. Bissextili, incipit, *Rex Justiciariis suis de Banco* &c. sub formula Chartæ plomatis seu brevis. Statutum de Protectionibus, anno tricesimo tertio Ed. 1. de conjunctim feoffatis, anno tricesimo quarto Ed. 1. incipit, *Rex omnibus ad quos* &c. & concludit, *In cujus rei testimonium has literas nostras fieri fecimus patentes Teste*, &c. Item statutum de Articul' Cleri 9 Ed. 2. additur, Edwar' *Dei gratia Omnib' ad quos* &c. & concludit, *In cujus rei* &c. *Teste* &c. Duo statuta edita an. 14 Ed. unum pro Clero, alterum Angl', qd' non subjecta

Galliæ, & multa alia ſtatuta parliamentaria edita ſunt ſub formula Chartæ Regiæ. Et determinatum fuit, hæc verba in Actu vel Charta (ſcilicet Authoritate Parliamenti) ſufficere ad illum faciendum Actum Parliamenti. *Bracton* Curiam Parliamenti appellat *Magnam Curia', magnu' Conſiliu', & commune Conſilium Regni.* Dictu' ſtatutum, de an. Biſſextili, eſt, *Rex per conſilium fidelium ſubditoru'.* Statutum de Bigamis, an. 4 Ed. 1. *In præſentia venerabilium patrum quorundam Epiſcopor' Angl' & alior', de conſilio Reg.* 7 Ed. 1. de Religioſis, *De conſilio Prælatoru', Comit', Baron', & aliorum fidelium Reg. noſtri, de Conſilio noſtro exiſtentium, providimus, ſtatuimus, & ordinavimus:* & in ſtatuti (ut dicam) fronte, *Dominus Rex in parliamento ſuo ſtatuta edidit.* 13 E. 1. Statut' de Winton', in eodem ſtatuto dicitur, Domin' noſter Rex, ad minuendum vires Felonum, ſtatuit pœnam hoc caſu &c. & in concluſione ſtatuti antedicti, Rex mandat & prohibet, quod amodo neq; nundinum neq; mercatus teneatur in cœmiteriis. 20 E. 1. Statutum de vocatis ad warrant', *Dominus Rex de communi conſilio ſuo ſtatuit.* Statutum de Appellatis 28 E. 1. Domin' Rex in Parliament' Statuit. 27 E. 3. cap. 1. de Stapula, cur' Parliam' nominatur Mag' conſil'. Et multi Act', huc ſpectantes, ad demonſtrand' varietat' Contextus Statu'

to France, and many other Acts of Parliament are made in the Form of the King's Charter. And it was reſolved, That theſe Words in an Act, or Charter, (By Authority of Parliament) are ſufficient to make it an Act of Parliament. Bracton calls the Court of Parliament, Magna Curia, Magnum Conſilium, and Commune Conſilium regni. The ſaid Statute de anno Biſſextili, is Rex per Conſilium fidelium ſubditorum. The Statute de Bigamis, Anno 4 E. 1. In præſentia venerabilium patrum quorundam Epiſcoporum Angliæ, & aliorum de Conſilio Regis. 7 E. 1. De Religioſis, De Conſilio Prælatorum, Comitum, Baronum, & aliorum fidelium regni noſtri, de Conſilio noſtro exiſtentium, providimus, ſtatuimus & ordinavimus: And, as I may ſay, in the Front of the Act, Dom' Rex in Parliamento ſuo (*a*) Statuta edidit. 13 E. 1. The Statute of Wincheſter, in the ſaid Act it is ſaid, Our Lord the King, to abate the Power of Felons, hath eſtabliſhed a Pain in this Caſe, &c. and in the End of the ſaid Act the K. commands and forbids, That from henceforth neither Fair nor Market be holden in Churchyards. 20 E. 1. The Stat. De vocat. ad Warrant'. Domin' Rex de (*b*) Communi Conſilio ſuo ſtatuit. The Stat. de Appellatis 28 E. 1. Dom' Rex in Parl' (*c*) ſtatuit. 27 Ed. 3. c. 1. Staple, the T. of Parl. is called the Gr. Counc. and many Acts to this Purpoſe were cited to ſhew the variety of Penning

(*a*) 2 Bulſt. 187.

(*b*) 2 Bulſt. 187.

(*c*) 2 Bulſt. 187.

of Acts of Parliament: and the original Writs which are founded on any Statute say, Quare cum de Communi Consilio reg' nostri Ang' provisum sit &c. and the Writ on the Stat. of Labourers saith, Cum per Consilium nostrum pro communi utilitate regni ordinatum sit. 11 H. 7. 27. If an Act of Parliament be penned by assent of the King, and of the Lords Spiritual and Temporal, and of the Commons, or, it is enacted by Authority of Parliament, it is a good Act; but the most usual way is, that it is enacted by the King, by the Assent of the Lords Spiritual and Temporal, and of the Commons, 7 H. 7. 14. *a. b.* & 34 Ed. 3. 12. *acc.* and there it is said, that there are many Statutes which are indited, Quod Dominus Rex statuit: Yet if they be entred in the Parliament (*a*) Roll, and always allowed for Acts of Parliament, it shall be (*b*) intended that it was by Authority of Parliament: But if an Act be penned, that the King with the Assent of the Lords, or with the Assent of the Commons, it is no Act of Parliament, for (*c*) three ought to assent to it, scil. the King, the Lords and the Commons, or otherwise it is not an Act of Parliament; and by the Record of the Act it is expressed which of them gave their Assent, and that excludes all other Intendments that any other gave their Assent: and so there is a Difference between a general and particular Penning of an Act of Parliament. Vide 8 H. 6. c. 29. and 5 R. 2. c. 2. of

torum Parliamenti citat' fuerunt. Et originalia brevia Regis, super aliquo fundata statuto, dicunt, *Quare cum de communi Consilio Regni nostri Ang' provisum sit &c.* & breve super stat' de Laborator' dic', *Cum per consilium nostrum pro communi utilitat' reg. ordinat' sit.* 11 H. 7. 27. Si actus Parliam' scribatur, De assensu regis & Dominorum spiritual' & temporal' & comunitat, vel, Inactitat' est authoritate Parliam' hujusmodi valet act'; formalis vero magis est qui sancitur, per Reg' de assensu Dom' spirit' & temp' & Comunit': 7 H. 7. 14. & 39 E. 3. 12. cum hoc concordant: & ibid' dicit', quod multa sunt statut' quæ scribunt', *Dominus Rex statuit*, si tamen rotulo Parliamentario intrentur, & semp' ut act' Parliament' approbentur, intendetur hæc authoritat' Parliamenti fuisse: Si vero Actus scribatur, Rex cum assensu Dom' vel cum assensu Communitat', iste nullus est Parliamenti Actus; huic enim tres assentire debent, scilicet, Rex, Domin', & Communitas, aliter actus Parliamenti non est; & per Recordum Act' exprimitur quis horum assensit, & hoc omnes intentiones (quod aliqui alii assenserunt) excludit. Et sic est diversitas inter generalem & particularem contextum Actus Parliament'. Vide 8 H. 6. c. 29. & 5 Ric. 2. c. 2. de Fugitivis, 21 E. 3. 6. Episcopi Norvicensis casum. Et hoc ipso Parliament' de

11 Ed. 3.

(*a*) Co. Lit. 98. a. b.

(*b*) Co. Lit. 98. b.

(*c*) Plowd. 79. a. b. Dyer 144. pl. 60. Moor 824. Co. Lit. 159. b. Hob. 111.

11 *Ed.* 3. *Hen'* fil' *Henrici* Comitis Lancaſtriæ, creatus fuit per chart' (*ad requiſitionem Prælatorum & Procerum & Communitat' Regni noſtri in inſtante Parliamento noſtro apud Weſtm' convocat'*) in comitem Derb', ſibi & hæred' maſculis de corpore ſuo: Item per aliam Chartam Rex creat *Willihelm'* de Bohun (*de communi aſſenſu Prælatorum, Comit', Baronum, & aliorum, de conſilio n'ro in præſenti Parliam' n'ro*) in Com' Northampt', ſibi & hæred' de corpore ſuo: Et iſto eod' Parliam' per chart' creat' *Hugonem de Audely* in Com' Glouceſt', *de definito dict' Parliam' n'ri conſilio, &c.* Et per chart' in verb' ſimilib', Rex in eod' Parliam' creat *Willihelmum Clynton* in Com' Huntingd' in feodo talliat', *Robert'* de Ufford in Com' Suff' in feodo ſimplici, *Willihelm' de Monte acuto* in Com' Sar' in feod' ſimplici: & hæ omnes fuerunt creationes cum donationib' terrar' (*ad ſuſtinendum nomen & onus*) per authoritatem Parliam', ſub formula chartæ Reg' cum concluſione de *Hiis teſtibus*, & eor' nonnullæ cum ſubſcriptione, *Per Regem & Conſilium in Parliam.* aliæ vero, *Per Regem & Conſilium in pleno Parliam.* & aliæ etiam, *Per ipſum Regem & totum Conſilium in Parliam' &c.* quæ o'nes vim habent unam & eandem. Et hæc fuerunt argumenta collecta ex ipſa charta, & aliis ſtatutis Parliamenti, quæ ſcribuntur in forma Chartæ Regis.

Fugitives: 21 E. 3. 6. **The Biſhop of** Norwich **his Caſe. And at this very Parliament of** 11 E. 3. Henry, **Son of** Henry, **Earl of** Lancaſter, **was created by Charter**, ad requiſitionem Prælatorum, & Procerum & Communitatis regni noſtri in inſtante Parliamento noſtro apud Weſtm' convocat' **to be Earl of** Derby, **to him and the Heirs Males of his Body. Alſo by another Charter, the King created** William de Bohun, de communi aſſenſu Prælat', Comit', Baronum, & aliorum de Conſilio noſtro in præſenti Parliamento noſtro, **Earl of** Northampton, **to him and the Heirs of his Body. And at the ſame Parliament, he by Charter created** Hugh de Audley **Earl of** Glouceſter, de definito dicti Parliam' noſtri Conſilio, &c. **And by Charters with the like Words, the King at the ſame Parliament created** Will. de Clynton **Earl of** Huntingdon **in Tail**, Robert de Ufford **Earl of** Suffolk **in Fee-ſimple**, Will. de Monte acuto **Earl of** Saliſbury **in Fee-ſimple; and all theſe were Creations with Donations of Lands**, ad ſuſtinend' nomen & onus, **by Authority of Parliament, in Form of the King's Charter, with the Concluſion of** Hiis teſtibus, **and ſome with ſuch Subſcription,** Per Regem & Conſil' in Parliamento; **and ſome,** Per Regem & Conſilium in pleno Parliamento; **and others,** Per ipſum Regem & totum Conſil' in Par. &c. **all which are of one and the ſame Ef. And thoſe were the Proofs col. out of the Char.**

it

it ſelf, and other Acts of Parliament which are penned in the Form of the King's Charter.

2. The ſame is proved by Letters Patents, as Ex rotulo Patentium de anno 14 E. 3. num. 18. which was within three Years after the Charter: The King granted to the Prince, by the Name of Edward Duke of Cornwall, &c. to be Lieutenant of the Realm ſo long as the King ſhould be beyond the Sea. In anno 21 E. 3. ex rot' patent' in Turre, The ſaid Prince (within Ten Years after his Creation) for the Fine of a Thouſand Marks, did demiſe to Tideman de Limbergh, Cunagium Stannariæ totius Ducatus Cornubiæ pro tribus annis, necnon emptionem totius Stanni tam infra dictum Ducatum Cornubiæ quam Com' Devon' foſſi & fodendi quod vendi debet, Reddendo annuatim three Thouſand Marks; which the Prince could not have done, if he had but an Eſtate at will, as a greater he had not, if the ſaid Charter had not the Force of an Act of Parliament. Other Let. Pat. were cited in 5 H. 4. ex rot' patent' ibidem, Rex, &c. Sciatis quod Regum Angliæ primogeniti filii in Ducatum Cornub' hæreditarie ſunt ſucceſſur': And divers other Pat. were cited to the ſame Effect.

3. The ſame is proved by Judgments and Reſolutions of Judges: In (a) 18 Aſſ. pl. 5. Thorp ſaith, That it was adjudged in Parliament, That if a Gift be made to one and to his

(a) Raym. 55.

2. Hoc probatur literis patentib', ſicuti ex rotulo patent' de anno 14 *E.* 3. Nu. 18. (quod fuit infra tres ann' poſt confectionem chartæ) Rex concedit Principi, per nomen *Edwardi* Ducis Cornub', quod Locum tenens eſſet regni tam diu quam Rex foret ultra mare. In anno 21 *Ed.* 3. ex rot' Patentium in Turre, dictus Princeps (infra decem annos poſt creationem ſuam) pro fine mille marcarum, dimiſit cuidam Tideman de Limberg *Cunagium Stannariæ totius Ducatus Cornubiæ pro tribus annis, necnon emptionem totius Stanni tam infra dictum Ducatum Cornubiæ quam com' Devon' foſſi & fodendi, quod vendi debet, Reddend' annuatim* 3000 *marcas:* quod Princeps facere non potuit, ſi habuiſſet ſtatum ſolummodo ad voluntatem, ſicuti majorem non habuerat, ſi dicta charta in ſe non habuiſſet vim Actus parliamenti. Aliæ liter' patentes citabantur in an' 5 *H.* 4. ex rotul' Patentium ibidem, *Rex, &c. Sciatis quod regum Angliæ primogeniti filii in Ducatum Cornub' hæreditarie ſunt ſucceſſuri.* Et diverſæ aliæ literæ patentes citabantur in hoc propoſitum.

3. Hoc etiam probatur Judiciis & Determinationibus Judiciariis. 18 *Aſſ. pl.* 5. *Thorpe* dicit, quod adjudicatum fuit in Parliamento, ſi donatio facta ſit alicui & hæredibus ſuis maſculis, quod ſorores & alii hæredes colli-

collaterales perinde atque hæredes maſculi, hæreditabunt, quoniam per iſtiuſmodi donationem habet feodum ſimplex: & inferebatur, quod tal' determinatio bene eſſe poteſt ad parliamentum in anno undecimo *Edwardi* tertii, ubi dict' creatio princip' & annexatio dictarum terrarum per pendebantur: Et quoniam hoc effici non potuit donatione vel conceſſione, conſulebatur quod fieret Actu Parliamenti; eo quod non fuit aliquis hujuſmodi deſcenſus vel curſus hæreditarius ad communem Legem. 21 *Edward'* 3. 41. manerio de Berkhamſted per dictam chartam Ducatui Cornubiæ annexo) Judices approbant donationem dicti maner' fore in lege validam Principi; quod eſſe non potuit (ut ſæpi' dictum fuit) ſi ill' donatio non habuiſſet vim actus parliamenti. 39 *E.* 3. 12. Rex anno undecimo regni ſui ad parliamentum ſuum tentum apud Weſtmon' præfecit Principem in Ducem Cornubiæ, & diverſos alios in Comites regni ſui; inter quos fuit *Willihelmus de Monte acuto*, comes de Sarum. Et in 43 *Aſſ. pla.* 15. 45 *Aſſ. pla.* 6. Donatio & annexatio poſſeſſionum dicti Ducatus, Principi conceſſarum per dictam Chartam, approbantur foret in Lege validæ. 50 *E.* 3. inter Record' in Turre de eodem anno, *Johanna* uxor dicti Principis dotata fuit in

Heirs (a) Males, that his Siſters and other Heirs collateral, as well as Heirs Males, ſhall be inheritable, becauſe by ſuch Gift he hath Feeſimple; and it was inferred, that ſuch Reſolution might well be at the Parliament 11 Edw. 3. where the ſaid Creation of the Prince, and Anneration of the ſaid Lands, were in Conſideration: And becauſe it could not take Effect by Gift or Grant, it was adviſed that it ſhould be by Act of Parliament, becauſe there was not any ſuch Deſcent or Courſe of Inheritance by the Common Law. 21 E. 3. 41. the Manor of Berkhamſted was by the ſaid Charter annexed to the ſaid Dutchy, the Judges there allowed the Gift of the ſaid Manor to be good to the Prince, which could not be, as it hath been often ſaid, if it had not the Force of an Act of Parliament. 39 Ed. 3. 12. The King, anno 11. of his Reign, at his Parliament held at Weſtminſter, made the Prince Duke of Cornwall, and many others, Earls of this Realm, amongſt which was Will. de Monte acuto, Earl of Saliſbury. And in 43 Aſſ. pl. 15. & 45 Aſſ. pl. 6. the Gift and Anneration of the Poſſeſſions of the ſaid Dukedom, granted by the ſaid Charter to the Prince, was allowed to be good. 50 E. 3. inter record' in the Tower, in the ſame Year Johan the Wife of the ſaid Prince, was, by Order of Law endowed in Chancery,

(a) Raymond 55. Dav. 34. b. 35. a. 43. a. 27 H. 8. 27. a. Co. Lit. 13. a. 27. a. b. Br. Deviſe 1. Br. Eſtates 2. 33. 9 H. 6. 25. a. 18 E. 3. 45. b. 2 And. 138, 156. 1 Co. 43. b. 46. a. 49. a. 7 Co. 40. b. Moor 416. Hob. 224. Plow. 251. a. 335. a. Lit. Sect. 31. 1 Roll. 860. 1 Bulſtr. 10, 222. 1 Mod. Rep. 196. B. N. C. 5. 1 Brownl. 45. 2 Brownl. 334.

cery, of the Poſſeſſions granted by the ſaid Charter to the Prince her Husband; ergo, the Charter did convey an Eſtate of Inheritance to the Prince. Anno 5 H. 4. ex Rot' Parl' the ſame Year a Petition in Parliament was exhibited by the Commons, for the Reſumption of all Grants and Letters Patents before made, of the Lands of the ſaid Dutchy of Cornwall, to which the King and the Lords with great Gravity and Juſtice, knowing the Danger ſuch private Bills would introduce, although it concerned the King's eldeſt Son (an excellent Precedent to give a Caveat to paſs few or no private Bills between Subject and Subject, but to refer them either to the Courts of Equity, or of Law, where the Cauſe may be duly examined, and upon Deliberation diſcerned and adjudged) gave ſuch Anſwer, It is agreed by the King and the Lords in Parliament, that the ſaid Lord the Prince, by Advice of his Council, may have Writs of Scire facias, or other Recovery, the beſt he may have by the Statutes and Laws of the Kingdom, according as the Caſe requires: And thereupon a (*a*) Scire facias was brought in the Name of the King, at the Petition of the Prince, Trin. 5 H. 4. in the Chancery, to repeal a Grant which Rich. 2. made (and which was confirmed by King the Fourth) of the Manor of Riſberghe in the Coun. of Ox' Parcel of the ſaid Dut. to Sir Lewis Clifford, and

(*a*) 2 Roll. 192.

Cancellaria de poſſeſſionibus, Principi, ſuo marito, per dictam Chart' conceſſis: Ergo ill' chart' dat Principi ſtat' hæreditarium. Anno 5 *H.* 4. ex rot' Parliam. eodem an' petitio in Parliamentum exhibita fuit per communitatem, ad reſumendas omnes conceſſiones & literas patentes ante tunc factas de terris dicti Ducatus Cornubiæ: ad quam Rex, & Domini, ſumma cum gravitat' & juſtitia (ſcientes periculum quod bill' hujuſm' privat' introducerent) quamquam ſpectabat ad fil' Reg. natu maxim' (ſingulare exempl' admonition' dandæ, quod perpaucæ aut nullæ edantur billæ privat' int' ſubdit' & ſubitum, ſed poti' quod referantur ad cur' vel Æquitat', vel Legis, ubi cauſa & recte exequi, & deliberatione diſcerni & adjudicari poteſt) reſponderunt, accordatum eſt per regem & dominos in Parl', quod dict' Dominus Princeps de adviſamento concilii ſui habeat brevia de Scire fac' vel aliam recuperation', optimam quam habere poteſt per ſtat' & Leges reg', ſecund' hoc quod caſus requir'. Et ſup' hoc brev' de Sci' fac' latum fuit Reg' nomine ad petitio' Principis Trin' 5 *H.* 4. in Cancellaria ad repellendum conceſſionem factam per *Ric'* 2. (& confirmatam per regem *H.* 4.) de manerio de Risberghe in com' Oxon', parcell' dicti Ducatus, *Ludovico Clifford* milit' & hæredib' ſuis,

ſuis, qui returnat' fuit ſummonit', & fecit defaltam, *Per quod de adviſament' Juſticiariorum, &c. conſideratum fuit tunc & ibidem, quod literæ prædict' præfato Ludovico ut præfertur factæ revocentur & adnullentur, &c.* Aliud breve de Scire fac' latum fuit anno 6 *H.* 4. Regis nomine, ad petitionem Principis, in Cancell', ad repellendam conceſſionem factam per Regem *Rich.* 2. (& confirmatam per Reg' *H.* 4.) de manerio de Heleſton in Kerier in comitatu Cornubiæ, Nicholao Sarnfield militi, & Margaretæ uxori ejus, pro vita eorum; & ad return' brevis de Scire fac', ſcilicet, octab' Hill', Princeps per Tho. Beſton Attor' ſuum apparet, & dicta etiam Margeret', marito ſuo defuncto, *Et prædict' Princeps petit quod literæ prædictæ in forma prædicta factæ revocentur & adnihilentur, & quod prædict' manerium, &c. in manus Domini Regis ſeiſiatur, & eidem Principi tanquam membrum & parcell' Ducatus prædicti juxta formam & effectum dictorum doni, conceſſionis, & unionis præfati avi Domini Regis, habendum & tenendum, liberetur:* Et hoc Recordum liberat' fuit per Cancellarium in bancum Regis (*Gaſcoigne* tunc temporis exiſten' capitali Juſticiario) & ſuper hoc Margareta placitando, producit Conceſſionem Reg' *Ric.* 2. ſibi pro vita factam, & precatur in auxilium de Rege, & habuit, &c. Et Curia dat diem, &c. Et Princeps

his Heirs, who was returned, ſummoned, and made Default; Per quod de adviſament' Juſticiarum, &c. conſideratum fuit tunc & ibidem, quod Literæ prædict' præfat' Ludovico ut præfertur factæ revocentur & adnullentur, &c. Another (*a*) Scire facias was brought An' 6. H. 4. in the Name of the King, at the Petition of the Prince, in the Chancery, to repeal a Grant made by King Richard the Second, and confirmed by King Henry the Fourth, of the Manor of Heleſton, in Kerier in the County of Cornwall, to Nicholas (*b*) Sarnfield, Knight, and Margaret his Wife, for their Lives, and at the Return of the Scire facias, ſc. Octa' Hill', the Prince by Thomas Beſton his Attorney, appeared, and the ſaid Margaret alſo, her Husband being dead, Et prædictus Princeps petit quod Literæ prædictæ in forma prædicta factæ revocentur & adnihilentur, & quod prædictum manerium, &c. in manus Domini Regis ſeiſiatur, & eidem Principi tanquam membrum & parcell' Ducatus prædicti juxta formam & effectum dictorum doni, conceſſionis, & unionis præfati avi Domini Regis, habendum & tenendum, liberetur. And that Record was delivered by the Chancellor into the King's Bench (Gaſcoigne being then Chief Juſtice) and thereupon Margaret pleaded the Grant of King Richard the Second, to her for Life, and prayed in Aid of the King, and had it, &c. and the Court gave Day, &c. And the Prince

(*a*) 2 Sand. 25. Hill. 6 H. 4. in Banco Regis, rot. 68.

(*b*) 2 Sand. 25.

at

at the Day brought a Procedendo in loquela, dum tamen ad judicium reddendum Domino Rege inconsulto nullatenus præcederetur: and thereupon Margaret made Default, and thereupon Day is given by the Court to the Prince, &c. At which Day the Prince brought a (a) Procedendo ad judicium, upon which the Court gave Judgment as follows: Consideratum est, quod literæ prædict' in forma præd' factæ revocentur & adnullentur, & quod dictum manerium, &c. in manus Domini Regis seisiatur, & eidem Principi tanquam membrum & parcell' Ducatus præd' juxta formam & effectum dict' doni, concessionis & unionis præfati avi dicti Regis, habendum & tenendum liberetur. And in Mich. 30 Hen. 8. in memorandis Scaccarii, Rot. 16. the Record saith, Ad Parliament' 11 E. 3. tent' inter alia ordinatum & inactitatum fuit, quod Comit' Cornubiæ imperpetuum moraretur ut Ducatus fil' senior' Regum Angliæ qui essent Hæred' propinquiores Regni absque aliquo modo donari, &c. And there is no Opinion in Law against it; for the Case in 1 Mar. 94. a.b. Dyer is such (the Record of which I have seen, which is entred Trin. 7 E. 6. Rot. 303.) In Replevin by Thomas Chafine, Esq; against the Lord Stourton, for taking, &c. at Mere in the County of Wilts, the Defendant did avow for Damage Fesant; and because the Place where doth contain 200 Acres of L. whereof

(a) 2 Sand. 25, 26.

ad diem protulit breve *de Procedendo in loquela, dum tamen ad Judicium reddend' dom. Rege inconsulto nullatenus procederetur*; & super hoc Margaret' fecit defalt', & inde dies dat' est per cur' Principi, &c. Ad quem diem Princeps protulit brev' de *Procedendo ad Judicium*; super quo Cur' Judicium reddidit, ut sequitur: *Consideratam est, quod liter' præd' in forma præd' fact' revocentur & adnullentur, & quod dict' manerium, &c. in manus dom' Reg' seisiatur, & eid' Principi tanquam membrum & parcel' Ducatus præd' juxta form' & effectum dictorum doni, concessionis, & unionis præfat' avi dict' Reg' habend' & tenend', liberetur.* Et in Mich. 30 H.8. in memorand' Scaccar' rot' 16. Record' dicit, *Ad parl' 11 Edw' 3. tent', inter alia, ordinat' & inactitat' fuit, quod com' Cornub' imperpet' moraretur ut Ducatus fil' Jenior' Reg' Angliæ qui essent hæredes propinquior' reg' absque aliquo modo donari, &c.* Et in lege nulla est opinio contra hoc: casus enim an. primo *Mar'* fol. 94. *Dyer*, est, (cujus record' ego vidi, quod intratur Trinitat' 7 *Edw.* 6. rot' 303.) In Replegiar' per Thom' Chafine armigerum versus domin' Stourton pro captione, &c. apud Mere in comitatu Wilts, defendens facit advocationem pro damno facto, & pro eo quod locus ubi, &c. continent 200 acras terræ, de quibus Rex *Henric'* 8 fuit seisitus in feodo, &

an

anno 35. ejuſdem *H.* 8. dimiſit cuidam Pyſter pro annis, qui eos conceſſit Dom' Stourton: in barram cujus advocationis dict' Chaſine quer' placitat, *Quod Dominus* Edward' *quondam Rex Ang' tertius, progenitor Domini Reg' nunc, fuit ſeiſitus de manerio de Mere in comitatu præd' unde, &c. in domin' ſuo ut de feodo in jure Coronæ ſuæ Angl', & ſic inde ſeiſitus exiſtens, ad Parliamentum ſuum tentum apud Weſtmonaſt' in com' Middleſex', die Lunæ proxim' poſt feſt' Sancti Mathiæ Apoſtoli, anno regni ſui* 11. *inter cætera, per aſſenſum omnium tam Prælatorum, Comitum, Baronum, & alior', quam gentium de communitat', accordatum fuit, quod pro honore dict' nuper regis & terr' ſuæ, & ad fortificationem ejuſdem, & pro eo quod ex antiquo eſſet unus Dux Cornubiæ quod dictus quondam Rex præficeret Dominum* Edward' *filium ſuum, adtunc comitem Ceſtriæ, Ducem Cornubiæ, & quod filius ſenior Regum Angliæ, videlicet, illi qui eſſent proximi hæredes de regn' Angliæ, eſſent Duces Cornubiæ, & quod dictus comitatus datus eſſet dicto Domino* Edwardo *in nomine Ducatus, & quod dictus Commitatus Cornub' imperpetuum moraretur ut ducatus filiorum ſeniorum Regum Angliæ qui eſſent proximi hæredes Regni abſque aliter donat' exiſten', prout in eodem actu, inter alia, plenius continetur: Poſteaque prædictus nuper Rex* Edwardus *tertius ſeiſitus exiſtens de præd' maner' de Mere*

King H. 8. **was ſeiſed in Fee; and** 35 H. 8. **demiſed to one** Pyſter **for Years, who granted it to the Lord** Stourton; **In Bar of which Avowry, the ſaid Plaintiff** Chaſine **pleaded,** Quod Dominus *Edward* quondam Rex Angliæ tertius, progenitor domini regis nunc, fuit ſeiſitus de manerio de Mere in Comitatu prædicto unde, &c. in Dominico ſuo ut de feodo in jure Coronæ ſuæ Angliæ, & ſic inde ſeiſitus exiſtens, ad Parliamentum ſuum tentum apud Weſtmonaſt' in comit' Midd', die Lunæ proxim' poſt feſtum Sancti Mathiæ Apoſtoli ann' regni ſui undecimo, int' cætera, per aſſenſum omnium tam prælator', comitum, baronum, & aliorum, quam genitum de communitate, accordatum fuit, Quod pro honore dicti nuper regis & ter' ſuæ, & ad fortificationem ejuſdem, & pro eo quod ex antiquo eſſet unus Dux Cornubiæ, quod dict' quondam rex præficeret Dominum *Edward'* filium ſuum adtunc comit' Ceſtriæ, Ducem Cornub', & quod filius ſenior regum Angl', viz. illi qui eſſent proxim' hæred' de Regno Angliæ, eſſent Duces Cornub', & quod dictus comit' dat' eſſet dicto domin' *Edward'* in nomine ducat', & quod dict' com' Cornubiæ imperpetuum moraretur ut Ducatus filior' ſenior' regum Angl' qui eſſent proxim' hæred' Regni abſque aliter donat' exiſten', prout in eod' actu inter alia plenius continetur: Poſteaque præd' nuper Rex *E.* 3. ſeiſitus exiſtens de præd' maner' de Mere

cum

cum pertinentiis unde, &c. in dominico ſuo ut de feodo & jure, ut in jure Coronæ ſuæ Angliæ, per literas ſuas patentes, quarum dat' eſt apud Weſtmonaſter' decimo ſeptimo die Martii anno Regni ſui 11. & in curia hic prolat', recitans per eaſdem, quod cum nuper perſonam dilecti & fidelis ipſius nuper Regis *Edward'* tunc comitis Ceſtriæ filii ſui primogeniti honorare volens, eidem filio ſuo nomen & honorem Ducis Cornubiæ dederit, ipſumque in ducem Cornubiæ præfecerit, & gladio cinxerit, ut deceret, Dederit & conceſſerit, & per eaſdem literas ſuas patentes pro ſe & hæredib' ſuis confirmaverit, eidem filio ſuo ſub nomine & honore Ducis dicti loci, inter alia, prædictum manerium de Mere cum pertinentiis: Habendum & tenendum eidem nuper Duci, & ipſius & hæred' ſuorum Regum Angliæ filiis primogenitis, dicti loci ducibus, in regno Angliæ hæreditarie ſucceſſur': quod quidem manerium cum pertinentiis idem nuper Rex *Edward'* 3. prædicto ducatui pro ſe & hæredibus ſuis per prædictas literas patent', inter alia, annexit & univit eidem imperpetuum remanſur', ita quod, &c. **And further pleaded the Cauſe of Revivification, as in the Charter: By Force of which Act, and of the ſaid Letters Patens, the ſaid** Edward **the Prince** fuit ſeiſitus de manerio prædicto, inter alia eidem ducatui unit' & annex' & ejuſdem ducatus parcell' in dominico ſuo ut

cum pertinentiis unde, &c. in Dominico ſuo ut de feodo & jure, ut in jure Coronæ ſuæ Angliæ, per literas ſuas patentes, quarum dat eſt apud Weſtmonaſter' xvii. die Martii anno Regni ſui undecimo, & in Curia hic prolat', recitans per eaſdem, quod cum nuper perſonam dilecti et fidelis ipſius nuper Regis Ed. *tunc comitis Ceſtriæ filii ſui primogeniti honorare volens: eidem filio ſuo nomen & honorem Ducis Cornubiæ dederit, ipſumque in Ducem Cornubiæ præfecerit, & gladio cinxerit, ut deceret, Dederit & conceſſerit, & per eaſdem literas ſuas patentes pro ſe & hæredibus ſuis confirmaverit, eidem filio ſuo ſub nomine & honore Ducis dicti loci, inter alia, prædictum manerium de Mere cum pertinentiis: Habendum & tenendum eidem nuper Duci, & ipſius & hæredum ſuorum Regum Angliæ filiis primogenitis, dicti loci ducibus, in Regno Angliæ hæreditarie ſucceſſur'; Quod quidem manerium cum pertinentiis idem nuper Rex* Edward' tertius *prædicto Ducatui pro ſe & hæredibus ſuis per prædict' literas patentes, inter alia, annexit & univit eidem imperpetuum remanſur', ita qd' &* Et ulter' placitat clauſula Revivificat' prout in chart' Virtute cujus act' & dict' literar' patent' dict' Princ' *Edw' fuit ſeiſitus de manerio præd' inter alia, eidem Duc' unit' & an' & ejuſd' Duc' parcell' in dom' ſuo ut de fe' & jur'* Et poſt' dict' Prin'

ob

, per quod Rex *Ed'* 3. ſeiſit' de dicto manerio odo: Et quod ille obiit, idem manerium deſcen- Regi *H.* 8. *ut conſan- & hæredi ipſius E.* 3. poſtea Rex *H.* 8. exitum it *E.* 6. filium ſuum genitum; per qd' ille Dux Cornubiæ &c. Et Rex *H.* 8. fecit dimiſ- em dicto *Pyſter* prout Et poſtea Rex *Ed.* 6. an' dimiſit dictas 200 acras *Chaſine* pro 21 annis. per quo partes morabant' lege; & quia dict' charta *E.* 3. placitabat' ſine thoritate ſeu vi Parliam', d' videbat', primo, quod ceps non habuit niſi ſta- ad voluntatem: 2. qd' non potuit unire & an- dict' manerium dic- Ducatui per literas paten- abſq; authoritate Parlia- ti, & idem facere par- am Ducat', & mutare nam & curſum Ducat': *r mortem Ducis Cornu-* manerium illud ad re- devenit ut eſchaeta pro ſtu Ducis & primogeni- lii, & deinde annexum & reunit' Coronæ loco m', & per nativitatem a- jus alius filii non poteſt rari &c. Et totum hoc ebat' tantum per Juriſ- ſultum; liber enim eſt, *Juſtic' noluerunt arguere caſum ut credo, propter gnantiam Mariæ Reginæ.* vero dict' opinio admit- tur, nihil tamen probat hanc determinatione'; enim actus in placito morat' nihil transfert, chartam oportet dictum ut de feodo & jure: And afterwards the ſaid Prince Edward died, by which King Edw. 3. was ſeiſed of the ſaid Manor in Fee, and that he died, and the ſame deſcended to King Henry the Eighth, ut conſanguineo & hæredi ipſius Edw. 3. and afterwards King Hen. 8. had Iſſue Edw. 6. his firſt begotten Son, by which he was Duke of Cornwall, &c. And afterwards King Hen. 8. made the Leaſe to Pyſter, prout, &c. And afterwards King Ed. 6. anno 4. demiſed the ſaid two hundred Acres to Chaſine for one and twenty Years, upon which it was demurred in Law. And becauſe the ſaid Charter of King Edw. 3. was pleaded (without authority or force of Parliament) there it ſeemed, 1. That the Prince had but an Eſtate at will. 2. That the King could not unite and anner the ſaid Manor to the ſaid Dutchy by Letters Patents without authority of Parliament, and make it Parcel of the Dutchy, and to alter the Form and Courſe of the Dutchy. 3. Per mortem Ducis Cornubiæ, the Manor came to the King as an Eſcheat for want of a Duke and firſt begotten Son, and was then knit and rejoined to the Crown in lieu of the Seigniory, and by the Birth of any other Son it could not be ſevered, &c. And all that was moved only by one of the Council; for the Book ſaith, Et Juſtic' nolu' arguere iſtu' caſu' ut credo, propt' pregn' M. Reg'. But if the ſaid Opin. ſhould be admit. yet it proves nothing againſt this Reſo. for the ſaid Act

mentioned in the Plea passes nothing, but the Charter ought to pass the said Manor, and the same cannot pass in such manner without Authority of Parliament, nor can the Charter alone anner the said Manor to be Parcel of the Dutchy, and the Charter was not pleaded to be made by Authority of Parliament. And as to the Opinion in the Case of Alton-Woods, in the first Part of my Reports, it is there also admitted, that the said Grant was only by Charter.

4. It is proved by Judgments and Resolutions in Parliament, That the said Charter of Creation hath the Authority and Force of Parliament; 1. Ex Rot' Parliam' anno 5 Hen. 4. a Judgment given in Parliament against Sir John Cornwall and his Wife, Countess of Huntingdon, for certain Manors which she had of the Dutchy of Cornwall, and which were annexed to it: Also by the Act of 33 H. 6. which see inter originalia de 35 H. 6. rot' 29. ex remem' Thesaurar' in Scaccario: Et ex Rot' Parliam' de 9 H. 5. where it is resolved and affirmed by both Acts of Parliament, that the said King Ed. 3. by his Charter 17 Mar' an. 11 E. 3. of the common Assent and Counsel of the Prelates, Earls, Barons, and others of his Council in his Parliam. gave, &c. as in the Chart. And it is provided by the same Act of Parliam. of 9 H. 5. That the Manor of Istelworth, which was annexed by the said Char. &c. should be

manerium transferre; & tali modo transferr' non potuit sine authoritate Parliam' neq; chart' tantum dictum maneriu' ut parcell' ducatus annectere potuit: & chart' non placitata fuit fieri authoritate Parl'. Et quoad opinionem in casu de Alton-Woods in prima mearum Relationum parte, ibidem etiam admittitur, qd' dicta concessio fuit per chartam tantum.

4. Probatur Judiciis & determination' in Parliam' quod dict' charta creationis habet authoritatem & vim Parliam': Ex rot' Parl' an. 5 *H.* 4. Judicio in Parliam' reddito versus *Johan' Cornwall* mil' & uxorem ejus Comitissam de Huntingdon', de quibusdam maner' (quæ ill' habuit) Ducatui Cornubiæ pertin', & eidem annexis: Actu etiam de an. 33 *H.* 6. quem vide int' originalia de 35 *H.* 6. rot' 29. ex' remem' Thesaur' in Scaccario: Et ex rott' Parliam' de anno 9 *H.* 5. ubi determinatum & affirmatum fuit per utrosque Actus Parliamenti, quod dictus Rex *Ed.* 3. per Chartam suam 17 die Martii anno 11 *Ed.* 3. de communi assensu & consilio prælatorum, Comitum, Baronum, & aliorum, de suo concilio in Parliamento suo, dedit &c. prout in charta. Et provisum est per eundum Actum Parliamenti de anno 9 *H.* 5. qd manerium de Istelworth, quod per dict' Chart' annectebatur &c. rursus separaretur

retur & disjungeretur &c. in quo res duæ obſervatæ fuerunt: 1. quod dict' char- Regis *E.* 3. habet autho- tatem & vim Parl': quod dictum manerium de Iſtel- worth ſic annectebatur &c. quod ſeparari ſeu disjungi non potuerat, ſi non per dictum Parliamenti. Et to- rum hoc affirmatur etiam per alium Parliam' Actum anno 38 *H.* 6. ex rot' Parl' Vide Actum de 3 *E.* 4. ex rot' Parliam', & actum de 22 *E.* 4. ex eodem rot', de excambio quodam prælongo inter Regem & Comitem de Huntingdon', qui Act' revocatur per quendam Ac- tum anno 11 *H.* 7. editum: Et vide Actum de 1 *H.* 7. ex rot' Parliamenti de eo- dem anno (pars cujus pla- citatur per *Hele* Servientem ad legem & *Warwicum Hele*) per quem inactitatum eſt, quod Rex *Hen.* 7. haberet & teneret Ducatum Cor- nub' &c. ſibi & hæredibus ſuis in tam amplo & largo modo & forma &c. prout Reges *H.* 6. vel *E.* 4. aut eorum alter, gaviſi fuerunt dict' maneria &c. ſed omi- ſerunt hanc ſubſequentem clauſulam, ſcil. *And be it alſo ordained & eſtabliſhed by the ſame Authority, that when- ſoever our Sovereign Lord, by the Grace of God, have firſt a Son of his Body lawfully begotten, that the ſame Son and Prince have and enjoy the ſaid Dutchy of Corn- wall, &c. in as ample and large Form and Manner as any Prince firſt begotten Son of any King hath had*

ſever'd and diſannexed; in which two Things were ob- ſerved: 1. That the ſaid Charter of King Ed. 3. hath the Authority and Force of Parliament. 2. That the ſaid Manor of Iſtellworth was ſo annexed, &c. that it could not be ſevered or diſannexed but by Act of Parliament: And all this is likewiſe affirmed by another Act of Parlia- ment, anno 38 Hen. 6. ex Rot' Parliamenti. Vide the Act of 3 Ed. 4. ex Rot' Parliamenti, and the Act of 22 Edw. 4. ex eodem Rot' of a very long exchange between the King and the Earl of Huntingdon, which Act is revoked by an Act made 11 H. 7. And ſee the Act of 1 H. 7. ex Rot' Par- liamenti of the ſame Year, (Part of which is pleaded by Hele Serjeant, and Warwick Hele) by which it is enact- ed, that Hen. 7. ſhould have and hold the Dukedome of Cornwall, &c. to him and his Heirs, in as large and ample Manner and Form, &c. as the Kings H. 6. or Ed. 4. or any of them enjoyed the ſaid Manors, &c. But they omit- ted this ſubſequent Clauſe, ſcilicet, And be it alſo or- dained and eſtabliſhed by the ſame Authority, that when- ſoever our Sovereign Lord, by the Grace of God, have firſt a Son of his Body lawful- ly begotten, that the ſame Son and Prince have and en- joy the ſaid Dutchy of (a) *Cornwall*, &c. in as ample and large Form and Manner as any Prince, firſt begotten Son of any King, hath had or en-

(a) 1 Bulſt. 133.

joyed before this Act. And all that which hath been said, is resolved and affirmed by Authority of Parliament, anno 32 H. 8. mentioned in the Scire facias: Wherefore it was resolved by the Lord Chancellor, and the said Justices, That the said Charter hath the Authority and Force of an Act of Parliament.

2. Point. As to the second Point it was resolved, That the Charter having the Authority and Force of Parliament, is sufficient in itself, without any other Act; and if the King's Scire facias hath sufficient Matter it shall never abate for Surplusage not Material. Vide 4 Hen. 6. 16. b. 45 E. 3. 6. a. 40 Ass. pl. 26. Vide the Act of 9 Hen. 5. for there it is affirmed by the whole Parliament, That at the Parliament held at Westminster, the Monday next after the Feast of Saint Matthias the Apostle, in the 11 Year of the Reign of King Edward the Third, amongst other Things, it was agreed, That the eldest Sons of the Kings of England, scilicet, those who should be next Heirs to the Realm of England, should be Dukes of (a) Cornwall, and that the County of Cornwall should always remain as a Dutchy to the eldest Sons of the Kings of England, who should be next Heirs to the said Realm, without being given elsewhere. And thereupon King Edward by his Charter 17 Martii then next following, of common

(a) 1 Bulstr. 133.

or enjoyed before this Act. Et totum hoc qd' dictum fuerit, determinatum est & affirmatum per authoritat' Parl' anno 32 *H.* 8. memorati in brevi de Scire facias. Unde determinat' fuit per dominum Cancellar' & dictos Justiciarios, qd' dicta charta in se habet authoritat. & vim Actus Parliamentarii.

Quoad secundum Articulum determinat' fuit, quod dict' charta, in se habet authoritat' & vim Parl' sufficiens est ex seipsa sine aliquo alio Actu; & breve hoc de Sci' fac' qd' Rex protulit si materiam in se habeat sufficient', non cadet ob redundantia' nulli' momenti. Vide 4 *H.* 6. *f.* 16. *b.* 45 *E.* 3. 6. *a.* & 40 *Ass. pl.* 26. Vide actum antedictum de anno 9 *Hen.* 5. ibidem enim affirmatur per totum Parliamentum, quod ad Parliament' tent' apud Westm die Lunæ proxim' post festum sancti *Mathiæ* Apostoli An. Regni Regis *Ed.* 3. inter alia, accordatum fuit quod filii seniores Regum Angl', scilicet, illi qui essent proxim' hæredes Regni Angliæ, essent Duces Cornub': & quod com Cornubiæ imperpetuum moraretur ut Ducatus filiorum seniorum Regum Angliæ qui essent proxim hæredes dicti Regni, absque aliter donat' existen Et super hoc Rex ide *Edwardus* per chartam s am 17 Die Martii tu proxim' sequent' de co assensu & consilio Præl torum

torum, Comitum, Baronum, & aliorum, de consilio suo in dicto Parliam' existentium, dedit &c. Curia vero judicium suum fundarunt super Chartam Regis cum authoritat' & assensu Parliamenti: quæ de se ipsa sufficit.

Quoad tertium Articulum, determinatum fuit, q^d' Princeps habet statum de feodo simplici in dicto ducatu: omnis enim stat' hæreditarius, est aut feodu' simplex, aut feodum talliatum, & status hic non est talliatus, non enim limitatur vel restringit', verb' sive expressis sive æquipollentib' hæredib' de corpore Principis, donatio enim est, Principi *& ipsius & hæredu' suorum Reg' Angl' filiis primogenitis*, ita quod illum, qui hereditabit, oportet esse filium primogenitum hæred' Principis Nigri, hæres sit ille lineal' sive collateralis talem vero hæredem oportet esse Reg' Angl': qui modus limitationis status fuit brevis, excellens, & accuratus; ad creandum enim statum hereditarium, hæc verb' essentialia (scilicet, hæredib' suis) non omissa fuerunt, quanquam subinde temperata fuerunt & modificata, ut per ipsam limitationem apparet: Et quod hic status fuit hæreditarius, per dictum Recordum anno 50 *E.* 3. probatur, ex quo patet uxorem Principis Nigri fuisse dotatam. Et constat ex libro de Anno 21 *E.* 3. 41. quod

Assent and Counsel of the Prelates, Earls, Barons, and others being of his Council in the said Parliament, gave, &c. but the Court relied on the King's Charter, with the Authority and Assent of Parliament; for that of itself is Sufficient.

As to the third Point it was resolved, That the Prince hath an Estate in Fee-simple in the said Dukedom: For every Estate of Inheritance is either Fee-simple or Fee-tail, and this is not an Estate-tail, for it is not limited or restrained either by express Words, or by any that tantamount, to the Heirs of the Body of the Prince; for the Gift is to the said Prince, & ipsius & hæred' suorum Regum Angliæ filiis primogenitis. So that he who ought to inherit ought to be the first begotten Son of the Heirs of the Black Prince, be he Heir Lineal or Collateral; but such Heir ought to be King of England. Which manner of Limitation of the Estate was short, excellent and curious; for to raise the Estate of Inheritance these essential Words (his Heirs) were not omitted, altho' afterwards they were qualified, as by the Limitation appears. And that this was an Estate of Inheritance, is proved by the said Record of 50 Edward 3. by which it appears, That the Wife of the Black Prince was endowed. And it appears by the Book of 21 Eward 3. 41. that the

3. Point.

Co. Lit. 27. a. b.

Prince, in the said Manor of Berkhamstead (Parcel of the said Dutchy of Cornwall) had Fee. And the said Judgments in 5 and 6 H. 4. prove it; for there Judgment generally is given, That the Letters Patents should be revoked and made void, &c. which Judgment could not have been given, if any Estate or Reversion, or Possibility did remain in the Patentee, for then the Letters Patents should not be made void, but the Judgment should be, That the Letters Patents should be made void and annulled as to the Estate of the Prince. Also it appears by the Livery in 33 Hen. 6. ex Rot' Parl', and by Act of Parliament 38 Hen. 6. ex eodem Rot', that Edward, eldest Son of H. 6. had his Livery as Inheritable by Descent due to him by Birth-Right; and so had Edward, the first begotten Son of Edward 4. and Arthur, the first begotten Son of Hen. 7. to whom Livery was made of the said Dutchy, which belonged to them jure hæreditario. In anno 22 E. 4. ex Rot' Parliament', in the said long Exchange between the King and the Earl of Huntingdon, there the Prince is adjudged to be seised of the Dutchy of Cornwall in Fee-simple; and so it was unanimously resolved by the L. Chancellor and the said Justices, That the Prince hath a Fee-simple by Descent, in the Honour and Possessions of the said Dutchy.

4. Point. As to the 4th Point it was

Princeps in dicto manerio de Berkhamstead (parcell' dicti ducatus Cornub') habuit feodum. Et dict' ill' Judicia in annis 5 & 6 *H.* 4. hoc probant; ib' enim generaliter Judic' redditur, quod literæ patentes revocentur & adnullentur &c. qd' Judiciu' reddi non potuerat, si aliquis status, vel reversio, vel possibilitas, manet illi cui factæ fuerunt literæ patentes; tunc enim literæ illæ patentes non adnullarentur, sed Judicium esset, quod literæ patentes vacuæ sint & adnullatæ quoad statum Principis. Liquet etiam per liberationem in anno 33 *H.* 6. ex rot' Parliamen' & per Actum Parliamenti anno 38 H. 6. ex eodem rot', quod *Edwardus* senior fili' Regis *Hen.* 6. *had his Livery as Inheritable by Descent, due to him by Birthright.* Et sic habuit *Edw.* primogenitus filius *Ed.* 4. & *Arthurus* filius primogenitus *Hen.* 7. quibus facta fuit liberatio dicti ducatus qui ad illos spectabat jure hæreditario. In an. 22 *E.* 4. ex rot' Parliam' in dicto excambio prælongo inter Reg. & comitem de Huntingd' Princeps adjudicatur fore seisitus de Ducatu Cornub. in feodo simplici. Et sic fuit unanimi assensu determinatum per Dominum Cancellarium & dictos Justiciarios, quod Princeps habet feodum simplex per descens. in Honore, & possessionibus dicti Ducatus.

Quoad articul' 4. determi-

natur

natum fuit, quod contra generalem Actum Parliam' vel talem Actum, qualis notitiam Judices ex officio debent habere, pars altera non potest placitare Nullu' tale Recordum, horum enim Actuum Judices debent notitiam habere: si vero male recitatur, pars potest morari in Lege super hoc. Et in hoc casu Lex summa fundatur ratione; absit enim, si Recordu' hujusmodi statuti perderet' vel consumeret' igne vel alio modo, q'd hoc tenderet in generale Reipublicæ prejudicium; immo potius, quamvis perdatur vel consumat', Judices, vel ex impresione Typographica, vel ex recordo in quo placitat' fuit, vel alio modo, possint seipsos de hoc informare. Vide casu' de *Partridge & Croker* &c. in Comentar' *Plowd.* fol. 78.

Et determinatum fuit, q'd hoc statutum de Rege, & de Principe, qui est filius primogenitus Reg' pro tempore existentis, & hæres apparens Coronæ, perpetuis futuris temporib' est hujusmodi Act', cujusmodi Judices & totum Reg' debent habere noticiam: omnis enim subdit' interesse habet in Rege, & null' subditorum (qui infra leges ejus est) dividitur ab illo, suo capite & Domino supremo: res itaque, & negotia Regis, ad totum spectant regnum, & præcipue quando aguntur de Principe, filio primogenit' Reg', & hæreresolved, * That against a general Act of Parliament, or such Act whereof the Judges ex officio ought to take Notice, the other Party cannot plead Nul tiel record; for of such Acts the Judges ought to take Notice: † But if it be misrecited, the Party ought to demur in Law upon it. And in that Case the Law is grounded upon great Reason; for God forbid if the Record of such Acts should be lost, or consum'd by Fire, or other Means, that it should tend to the general Prejudice of the Commonwealth, but rather altho' it be lost or consumed, the Judges, either by the printed Copy, or by the || Record in which it was pleaded, or by other Means, may inform themselves of it. See Partridge and Croker's Case, *&c.* Plowd. Com. fol. 78.

‡ And it was resolved that this Act, which concerns the King, and the Prince who is the first begotten Son of the King, and Heir apparent to the Crown for the Time being, perpetuis futuris temporibus, is such an Act whereof the Judges and all the Kingdom ought to take Notice: For every Subject hath an Interest in the King, and none of his Subjects, who is under his Laws, are divided from him, being their Head and Sovereign, so that the King's Affairs and Concerns touch the whole Kingdom, and especially * when they regard the Prince,

* 3 Inst. 98. Godb. 178. 4 Co. 76. a. b.

† Co. Lit. 260. a.

|| Cr. Car. 355.

‡ 4 Co. 77. a. Hob. 226. Doct. pla. 338. Plow. 231. a.

* Hob. 226.

the first begotten Son of the King, and Heir apparent to the Crown, Coruscat enim Princeps radiis Regis patris sui, & censetur una persona cum ipso Rege, as it is said in the Act of Parliament of 38 H. 6. And therefore if any one intends the Death of the Prince, and declares it by open Act, it is High Treason, by the ancient Common Laws of England, and so declared by the Statute of 25 Edw. 3. 1 Hen. 5. 7. b. If the Prince, as Prince of Wales, hath Judgment to recover, and afterwards the Crown descends to him, he, as King, shall sue Execution. And with the Reason of this Resolution in this Point agreeth the Rule of the Court in Plowd. Com. in the Lord Berkley's Case, 231. That the Act of 35 Hen. 8. which concerns the Capacity of the Queen, was such an Act whereof the Judges ought to take Knowledge, because it concerns the King's Wife, and by * the same Reason in this Case of the Prince. And it was agreed, That if Nul tiel record should be admitted to be pleaded in this Case, that the Substance and Effect of the Record sufficient to maintain the said Scire fac. appears in the Record exemplified † under the Great Seal. It was also resolved, that the Act of 43 El. of Confirmation of Letters Patents pleaded by Hele Serjeant, and War. Hele his Son, doth not extend to this Case for two manif. Real. 1. Because the Act suppl. only certain

* Hob. 226.

† Co. Lit. 225. b.

de apparente Coronæ, *Coruscat enim Princeps radiis Regis patris sui, & censetur una persona cum ipso Rege*, ut dict' est in actu Parliam' de an. 38 *H.* 6. Et proinde, si aliquis intendit mortem princip', & hoc apert' declarat actione, est crimen læsæ Majestis, per antiquas communes Angl' leges, & sic declarat' per statut' de an. 25 *E.* 3. 1 *H.* 5. fol. 7. b. Si princeps, ut princeps Walliæ, Judicium habet recuperandi, & postea Corona illi descendit, ille, ut rex, prosequetur executionem. Et cum ratione huj' determinat' in hoc articulo concordat regula Cur' in Comment' *Plowd'* in casu Dom' *Berkley*, f. 231. qd' statut' de an. 35 *H.* 8. de capacitate Reg', tal' est act', qualis Judices debent notitiam habere, quia ad uxorem regis spectat: & eadem ratione in hoc casu de principe. Accordatum etiam fuit, si Nullum tale Recordum admitteretur ut placit' in hoc casu, qd' substantia & effect' Recordi sufficiens ad manutenend' dict' breve de *Scire facias*, apparet in Record' exemplificato sub magno sigillo. Determinat' etiam fuit, quod Actus de ann' 43 *Eliz.* de confirmation' literarum patent', placitatus per *Hele* Servientem ad legem & *Warwicum* ejus filium, non se extendit ad hunc casum, duas ob rationes manifestas. 1. Eo quod act' ille suppl' tantum quosdam defect' per

ticula

ficulares, ut male nominationem maneriorum, &c. male recitationem, vel non recitationem dimissionum, &c. & alias imperfectiones speciales in ill' Actu memoratas: 2. Act' idem facit literas patent' in lege validas tantum contra Regem hæredes & successores suos, cum Exceptione omnib' aliis, ideoque sine dubio jus Principis in hoc casu ligari per hunc non potest. Et quod statutum de an' 1 *H.* 7. quod *Hele* serviens ad legem, & dic' *Warwicus* placitaverunt, ut amici Curiæ, ad informandum Curiam de veritate, non eis affert aliquod auxilii: per hoc enim inactitatum est, Quod Rex *H.* 7. haberit sibi & hæredibus suis dictum Ducatum &c. in tam amplo & largo modo prout *H.* 6. vel *E.* 4. habuit: quæ verba relationis præservant Ducatum Cornub' secund' limitationem creationis per dict' chartam de an. 11 *E.* 3. Revera autem Serviens ille ad legem & fili' ej' non functi sunt officio amici, vel probi Relator'; pretermiserunt enim clausulam in eod' statuto expresse spectant' ad preservand' dict' ducat' Cornub' fil' primogenito Regis, &c. & isto modo moniti sunt in Cur' de ipiend' & veritat' supprim'd'. Determinat' denique fuit, quod in hujusmodi brevi de Scire facias per regem lato ad repellendas literas patentes factas de aliqua parcella dicti Ducatus, ea nimirum intentione ut Rex libe-

particular Defects, as Misnomer of the Manors, &c. Misrecital or Non-recital of Leases, and other special Imperfections mentioned in the Act. 2. The Act makes the Letters Patents good only against the King, his Heirs and Successors, with a saving to all others, and therefore without Question, the Right of the Prince in this Case cannot be bound thereby: And that the Act of 1 Hen. 7. which Hele Serjeant, and the said Warwick have pleaded, ut amici Curiæ to inform the Court of the Truth, avails them not; for it is thereby enacted, That King Hen. 7. shall have to him and his Heirs the said Dutchy, &c. in as ample and large Manner as H. 6. or E. 4. had it; which Words of Reference preserve the Dutchy of Cornwall according to the Limitation of Creation by the said Charter of 11 E. 3. But in Truth the Serjeant and his Son have not performed the Office of a Friend or of a good Informer, for they have omitted one Clause in the same Act which expresly concerns the Preservation of the said Dutchy of Cornwall to the first begotten Son of the King, &c. and have thereby endeavoured to deceive the Court, and suppress the Truth. And lastly, it was resolved, That (in such Scire facias brought by the King, to repeal Letters Patents made of any Parcel of the said Dutchy, to the End that the King may make

Livery

Livery to the Prince) the King or the Prince may reply to any Bar pleaded by the Defendants; and both ways are good in Law; but the better Form is, that the King's Attorney, 'till Livery be made, should Reply, as he did in the Case at Bar. And as to the Clause of Non obstante in the Letters Patents of M. Eliz. it was resolved, That it could not take away the Force of the said Acts of Parliament, nor Prejudice the Prince that now is of his Right in the said Dukedom.

In this Case divers Things were observed: 1. That the eldest Son of every King, after the said Creation, was Duke of Cornwall, and so allowed; as Henry of Monmouth, first begotten Son of Hen. 4. and Henry of Windsor, first begotten Son of H. 5. and Ed. of Westm', the first begotten Son of Hen. 6. and Edward of Westminster, the first begotten Son of Edw. 4. and Arthur of Winchester, the first begotten Son of Hen. 7. and Edward of Hampton, the first begotten Son of Hen. 8. And all these have enjoyed the Style, Honour and Possessions of the said Dutchy of Cornwall, so that the Possession hath been always, without interruption, with the first begotten Sons of the Kings, ever since the said Creation, in 11 Edw. 3. which is about three Hundred Years: So that after the Creation there was never a first

liberationem faceret Principi) Rex vel Princeps potest replicare ad barra' aliquam per defendentes placitatam; & utraque genera sunt in lege valida; melior vero formula est, quod Attornatus Regius, quousque liberatio facta sit, replicaret, ut in casu ad barram. Et quoad clausulam de *Non obstante* in literis patent' Reg' *El.* determinatum fuit, quod non potest vim tollere dicto' statutor' Parl' nec præjudicium esse Princ' qui nunc est, de jure suo in dicto Ducatu.

In hoc casu res diversæ observat' fuerunt. 1. Quod filius primogenitus uniuscujusq; regis post dict' creationem fuit Dux Cornub', & sic approbatus, ut *Henr'* de *Monmouth*, primogenitus fili' *Hen.* 4. & *Hen.* de *Windsor* primogenitus filius Reg' *Hen.* 5. & *Edw.* de *Westm'* primogenitus filius Reg' *H.* 6. & *E.* de *Westm'* fili' primogenit' Reg' *E.* 4. & *Arthurus* de *Wincheſter* primogenitus filius Regis *H.* 7. & *Ed.* de *Hampton* fil' primogenitus Reg' *Hen.* 8. Et hi omnes gavisi sunt Tutul', Honor', & Possessionibus dicti ducatus Cornubiæ; ita quod possessio semper fuerit, sine interruptione, primogenit' filiis Reg', omni tempore post dictam creationem in anno undecim' *Edwar.* 3. qui circa annos est trecentos, ita quod post illam creationem non unquam fuit filius pri-

primogenitus alicujus Reg' quin Dux fuerit Cornub'. 2. Qd' *Ric'us de Burdeaux* qui filius fuit principis Nigri, non fuit dux Cornub' vi dict' creationis: quanquam enim post patris sui obitum hæres Coronæ fuit apparens, eo tamen qd' non fuit filius primogenit' alicujus Regis Angliæ (ejus enim pater obiit vivente Rege *E.* 3.) dict' ille *Richardus* non fuit infra limitationem de 11 *Edw.* 3. & hac de causa in an. 50 *E.* 3. charta speciali creat' fuit dux Cornubiæ. Neque *Elizabetha*, filia primogenita Regis *Ed.* 4. fuit Ducissa Cornubiæ, illa enim fuit filia primogenita reg. & limitatio est, filio primogenito. Neq; Rex *H.* 8. vivente suo patre post mortem Princip' *Arthuri* fratris sui, non fuit vi dictæ creationis dux Cornubiæ: Quanquam enim ill' fuit sol' fili' & hæres apparens regis *Henrici* 7. eo tamen quod non fuit fili' primogenitus non fuit infra dictam limitationem; Princeps enim *Arthurus* filius fuit primogenitus. 3. Magna illa uniuscujusque Regis cura & respectus (a tempore dictæ Creationis) præservandi dictum Ducatum filio suo primogenito. Et post diversas continuationes, Judicium reddebatur, prout sequitur.

begotten Son of any King but he was Duke of Cornwall. 2. That Richard de Burdeaux, who was Son of the Black Prince, was not Duke of Cornwall by Force of the said Creation; for altho' after the Death of his Father he was Heir apparent to the Crown, yet because he was not the first begotten Son of any King of England (for his Father died in the Life-time of King Ed. 3.) the said Richard was not within the Limitation of 11 Ed. 3. and therefore in an. 50 E. 3. he was created Duke of Cornwall by a special Charter: Nor was Elizabeth, the eldest Daughter of King Ed. 4. Dutchess of Cornwall, for she was the first begotten Daughter of the King, and the Limitation is to the first begotten Son. Neither was King Hen. 8. in the Life of his Father, after the Death of Prince Arthur his Brother, by Force of the said Creation Duke of Cornwall; for altho' he was the sole Son and Heir apparent of Hen. 7. yet forasmuch as he was not the (a) first begotten Son, he was not within the said Limitation; for Prince Arthur was his first begotten Son. 3. The great Care and Regard of every King, from the Time of the said Creation, to preserve the said Dukedom to his first begotten Son. And after divers Continuances the Judgment was given as follows.

(a) F. N. B. 82. g.

Super

Super quo viſis & plenius intellectis omnibus & ſingulis præmiſſis per prædilectu' & fidelem Conſiliar' dicti Dom' Reg' nunc *Thomam* Dominum *Eleſmere* Cancel' Angliæ & per dict' Cur' hic, habitaque inde per eund' Dominum Cancellar' & dictam Cur' hic matur' & diligenti deliberatione & adviſamento cum *Johanne Popham* Milit' capitali Juſtic' dicti Domini Regis nunc ad placita coram ipſo Domino Reg' tenend' aſſignat', *Edwardo Coke* Mil' Capitali Juſtic. ipſius Domini Regis de Communi Banco, *Thoma Flemming* Milite capitali Barone de Scaccario ejuſdem Domini Regis & *David' Williams* Milite uno Juſtic' dicti Domini Regis, ad placita coram ipſo Domino Rege tenend' aſſignat', videtur eidem Domino Cancell' & dictæ Cur' hic, Quod plac' præd' *Johannis Hele & Warwici Hele*, per ipſos ſuperius in barram placitat' ac materia in eodem placito content' minus ſufficiens in Lege exiſtunt ad manutenend', Quod præd' Literæ Patentes prædict' nuper Regin' *Elizab'* de prædictis maneriis de Weſt Taunton, Trelowia, & Landulph præd', cum pertinen', in forma prædicta fact', revocari & cancellari, aut quod maneria illa cum perninen' in manus dicti Dom' Regis nunc capi & ſeiſiri non debeant, prout præd' *Henricus Hobart* Attornat' dicti Domini Regis generalis, qui, *&c.* pro eodem Dom' Reg' ſuperius inde allegavit. Et qd' præd'

Super quo viſis & plenius intellectis omnibus & ſingulis præmiſſis per prædilect' & fidelem conſiliar' dicti domini Regis nunc Thomam Dominum Eleſmere *Cancellar' Anglie & per dictam Cur' hic, habitaq; inde per eund' dom' Cancellar' & dict' Cur' hic matura & diligenti deliberat' & adviſamento cum* Johan' Popham *milit' capitali Juſtic' dicti dom' Regis nunc ad placita coram ipſo dom' Rege tenend' aſſignat',* Edward' Coke *mil' capitali Juſtic' ipſius dom' Regis de Com' Banco,* Thom' Fleming *milite capitali Barone de Scaccario ejuſdem dom' Reg'* & David' Williams *milite uno Juſtic' dicti dom' Regis ad placita coram ipſo dom' Rege tenend' aſſignat', videtur eidem dom' Cancellar' & dictæ Cur' hic, Qd' placitum præd'* Johan' Hele, & Warwici Hele, *per ipſos ſuperius in barram placitat' ac materia in eodem placito content' minus ſufficiens in lege exiſt' ad manutenend', Qd' præd' literæ patentes præd' nuper Reg'* Elizabethæ, *de prædict' maneriis de Weſt Taunton, Trelowia, & Landulph præd', cum pertinen', in forma præd' fact', revocari & cancellari, aut qd' maneria illa cum pertin' in manus dicti dom' Reg' nunc capi & ſeiſiri non debeant, prout præd'* H. Hobart *Attor' dicti dom' Reg' general' qui &c. pro eod' dom' Reg' ſuper' inde alleg'. Et qd' præd'*

placitum

placitum præd' Hen' Hobart *Attornat' dicti domini Regis nunc generalis, per ipſum pro eodem dom' Reg' modo & forma præd' (ad barram præd'* Hen' Lindley) *ſuperius replicand' placitat', ac materia in eodem placito content', ſufficien' in lege exiſtunt ad præcludend' præfat'* Hen' Lindley *a dicendo, qd' non habetur aliquod tale record' alicujus talis Actus Parliam' præd' nuper Regis* Edwardi *tertii edit', nec aliquod tale record' præd' chartæ per eundem nuper Reg'* Edwardum *tertium authoritate Parliam' prædicti confect', qual' in prædicto brevi de* Scire facias *inde ſuperius recitatur & ſpecificatur, prout præd'* Henricus Hobart *Attornat' dicti dom' Regis generalis, qui &c. pro eodem dom' Rege ſuperius inde allegavit. Ideo conſideratum & adjudicatum eſt per dictum dominum Cancellar', & per dictam Curiam hic, de Adviſamento prædicto, Qd' præd' literæ patentes prædict' nuper Regin' præfatis* Gellio Merick & Hen' Lindley, *ut præfertur, fact' (quoad prædict' maner' de Weſt Taunton, Trelowia, & Landulph prædict', cum pertinen') revocentur, evacuentur, adnullentur, ac vacuæ & invalidæ pro nullo penitus habeantur & teneantur. Ac etiam qd' irrotulament' earundem (quoad eadem maneria) caſſetur, cancelletur, & adnihiletur. Quodq; maneria illa cum pertinentiis in manus dicti dom' Regis nunc capiantur & ſeiſientur, ut ea præfato nunc Duci*

placitum prædicti *Hen' Hobart* Attornat' dicti dom' Reg' nunc generalis, per ipſum pro eodem domino Rege modo & forma præd' (ad barram prædict' *Henrici Lindley*) ſuperius replicando placitat', ac materia in eodem placito content' ſufficien' in Lege exiſtunt ad præcludend' præfat' *Henric' Lindley* a dicendo, quod non habetur aliquod tale record' alicujus talis Actus Parliamenti prædicti nuper Regis *Edwardi* tertii edit', nec aliquod tale record' prædict' Chartæ per eundem nuper Regem *Edwardum* tertium, authoritate Parliamenti prædicti confect', qual' in prædicto brevi de *Scire facias* inde ſuperius recitatur & ſpecificatur, prout prædictus *Henricus Hobart* Attornat' dicti domini Regis generalis, qui, *&c.* pro eodem domino Rege ſuperius inde allegavit. Ideo conſideratum & adjudicatum eſt per dictum dominum Cancellar' & per dict' Cur' hic, de Adviſamento prædicto, Qd' prædict' Literæ Patentes prædict' nuper Regin' præfatis *Gellio Merick* & *Henrico Lindley*, ut præfertur fact' (quoad prædict' maner' de Weſt Taunton, Trelowia, & Landulph prædict' cum pertinen') revocentur, evacuentur, adnullentur, ac vacuæ & invalidæ pro nullo penitus habeantur & teneantur. Ac etiam quod irrotulament' earundem (quoad eadem maneria) caſſetur, cancelletur & adnihiletur. Quodque maneria illa cum pertinentiis in manus dicti dom' Regis nunc capiantur & ſeiſient', ut ea

præfato

præfato nunc Duci tanquam membrum & parcell' Ducatus ſui prædicti ſecund' formam & effectum doni, conceſſion', & unionis prædict' habendum & tenendum, per dictum Dominum Regem nunc liberentur, &c.

tanquam membrum & parcell' Ducatus ſui prædicti, ſecundum formam et effectum doni, conceſſion', & unionis prædict' habendum & tenendum, per dictum domin' Regem nunc liberentur &c.

Paſchæ

Paſchæ 26 Eliz.

In the King's-Bench.

CALYE's *Caſe.*

IT was reſolved, *per totam Curiam* this Term, That if a (*a*) Man comes to a common Inn, and delivers his Horſe to the Hoſtler, and requires him to put him to Paſture, which is done accordingly, and the Horſe is ſtoln, the Innholder ſhall not anſwer for it; for the Words of the Writ, which lieth againſt the Hoſtler are, *Cum ſecundum legem & conſuetud' regni noſtri Angliæ* (*b*) *hoſpitatores qui hoſpitia com' tenent ad hoſpitandos homines, per partes ubi hujuſmodi hoſpitia exiſtunt tranſeuntes, & in eiſdem hoſpitantes, eorum bona & catalla infra hoſpitia illa exiſtentia abſque ſubtractione ſeu amiſſione cuſtodire die & nocte tenentur, ita quod pro defectu hujuſmodi hoſpitatorum ſeu ſervientium ſuorum hoſpitibus hujuſmodi damnum non eveniat ullo modo, quidam malefactores quendam equum ipſius A. precii 40 s. infra hoſpitium ejuſdem B. &c. inventum, pro defectu ipſius B. ceperunt, &c. Vide* Regiſtr' fol. 105. *inter Brevia de Tranſgr'* and *F. N. B.* 94. *a. b.* by which Original Writ (which is in ſuch Caſe the Grouud of the Common Law) all the Caſes concerning Hoſtlers may be decided. For, 1. it ought to be a (*c*) Common Inn; for if a Man be lodged with another (who is not an Innholder) upon Requeſt, if he be robbed in his Houſe by the Servants of him who lodged him, or any other, he ſhall not anſwer for it; for the Words are, *Hoſpitatores qui com' hoſpitia tenent*, &c. And ſo are the Books in (*d*) 22 *H.* 6. 21. *b.* (*e*) 38. (*f*) 2 *H.* 4. 7. *b.* (*g*) 11 *H.* 4. 45. *a. b.* (*h*) 42 *Aſſ. pl.* 17. (*i*) 42 *E.* 3. 11. *a.* 5 *El.* (*k*) *Dyer* 266. 5 *Mar. Dyer* 158. (*l*) And the Writ need not mention that the Defen. keeps *Commune Hoſpitium*, for the

(*a*) 1 Rolls 3. 4. 4 Leon. 96. 2 Brownl. 255.

(*b*) Plowd. 9. b. the Regiſter is falſe printed, ſcilicet, Diſtractione pro Subſtractione. F. N. B. 94. a. & b. Book of Entries, Tit. Hoſteler, f. 366, & 377. 1 And. 29. 3 Keb. 73. Dyer 266. b.

(*c*) 1 Rolls 2. d. 1. Dr. and Stud. 137. b. Hob. 245.

(*d*) Fitz. Hoſteler 2. Br. Action ſur le Caſe, 58. (*e*) 22 H. 6. 38. b Fitz. Hoſteler, 1. Br. Action ſur le Caſe 59. (*f*) Fitz. Hoſteler 4. Br. Action ſur

Caſe, 28. Br. Action ſur le Statute, 39. (*g*) Br. Action ſur le Caſe 41. Br. General Brief, 16. Fitz. Hoſteler, 5. (*h*) Br. Action ſur le Caſe, 86. Palm. 523. 1 Roll. 3. (*i*) Fitz. Hoſteler, 6. Br. Action le Caſe 15. Statham Action ſur le Caſe, 6. (*k*) Dyer 266. pl. 9. Poſtea 33. a. 3 Keb. 73. Dyer 158. pl. 52. 1 And. 29, 30. 3 Keb. 73. 1 Rolls. 3, 4.

the Words of the Writ in the Regiſter are, *infra hoſpitium ejuſdem B.* but it is to be ſo intended in the Writ; for the recital of the Writ is, *hoſpitatores qui communia hoſpitia tenent*, &c. and the one Part ought to agree with the other, and the latter Words depend on the other, and the Plaintiff ought to declare that he keeps *Commune Hoſpitium:* And ſo the Books in (*a*) 22 *H.* 6. 21. (*b*) 11 *H.* 4. 45. *a. b.* 10 *Eliz. Dyer* (*c*) 266. &c. are well reconciled.

(*a*) Antea 32. a. Fitz. Hoſtler 2. Br. Action ſur le Caſe, 58.

2. The Words are, *ad hoſpitandos homines per partes ubi hujuſmodi hoſpitia exiſtunt tranſeuntes, & in eiſdem hoſpitantes*; by which it appears that Common Inns are inſtituted for Paſſengers and Wayfairing Men; for the *Latin* Word for an Inn is, *Diverſorium*, becauſe he who lodges there is, *quaſi divertens ſe a via*; and ſo *diverſoriolum*. And therefore if a (*d*) Neighbour who is no Traveller, as a Friend, at the Requeſt of the Innholder lodges there, and his Goods be ſtoln, *&c.* he ſhall not have an Action; for the Writ is, *ad hoſpitandos homines*, &c. *tranſeuntes in eiſdem hoſpitantes*, &c.

(*b*) Antea 32. a. 1 Roll. 4. Br. Action ſur le Caſe, 41. Br. General Brief, 16 Fitz. Hoſteler, 5

(*c*) Antea 32. a. Dyer 266. pl. 9. Poſtea 33. a. 3 Keb. 73.

(*d*) 1 Roll. 3 E. 4. 2 Brown. 254.

3. The Words are, *eorum bona & catalla infra hoſpitia illa exiſtentia*, &c. So that the Innholder, by Law, ſhall anſwer for nothing that is out of his Inn, but only for thoſe Things which are *infra hoſpitium*. And becauſe the Horſe, which at the Requeſt of the Owner is put to Paſture, is not *infra hoſpitium*, for this Reaſon the Innholder is not bound by Law to anſwer for him, if he be ſtoln out of the Paſture; for the Thing with which the Hoſtler ſhall be charged ought to be *infra hoſpitium*; and therewith agree the Books in (*e*) 11 *Hen.* 4. 45. *a. b.* (*f*) 22 *Hen.* 6. 21. *b.* (*g*) 42 *E.* 3. 11. *a.* 42 *Aſſ. pla.* 17. where *Knivet* C. J. ſaith, That the Innholder is bound to anſwer for himſelf, and for his Family, of the Chambers and Stables, for they are *infra hoſpitium:* And with this Reſolution in this Point agreed the Opinion of the Juſtices of Aſſiſe (*viz.* the two Chief Juſtices, *Wray* and *Anderſon*) in the County of *Suffolk* in Lent Vacation, 26

(*e*) 1 Rolls. 4. Supra in a.

(*f*) Antea 32. a.

(*g*) Antea 32. a.

(*h*) 1 Rolls. 3, 4. 4 Leon. 96. 2 Brownl. 255. Antea 32. a.

That if an (*h*) Innholder lodges a Man and his Horſe, and the Owner requires the Horſe to be put to Paſture, and there he is ſtoln, the Innholder ſhall not anſwer for him.

(*i*) 1 Rolls. 3. 4. 4 Leon. 96. 2 Brownl. 255.

(*i*) But it was held by them, That if the Owner doth not require it, but the Innholder, of his own Head puts the Gueſt's Horſe to Graſs, he ſhall anſwer for him if he be ſtoln, *&c.* And it is to be obſerved, that this Word *Hoſtler* is derived *ab Hoſtle*; and *Hoſpitator*, which is uſed in Writs for an Innholder, is derived *ab hoſpitio*, and *hoſpes eſt quaſi hoſpitium petens.*

4. T

The Words are, *Ita quod pro defectu hospitator', seu ser-
fuorum*, &c. *hospitibus hujusmodi damn' non eveniat*,
which it appears that the Inn-holder shall not be char-
unless there be a Default in him or his Servants, in the
and safe Keeping and Custody of their Guest's Goods and
tels within his common Inn; for the Inn-keeper is
d in Law to keep them safe without any Stealing or
loining; and it is no Excuse for the Inn-keeper to say,
he deliver'd the (*a*) Guest the Key of the Chamber-
in which he is lodged, and that he left the Chamber-
open, but he ought to keep the Goods and Chattels of
Guest there in Safety; and therewith agree 22 *H.* 6. 21. *b.*
H. 4. 45. *a. b.* 42 *Edw.* 3. 11. *a.* And altho' the Guest doth
deliver his Goods to the Inn-holder to keep, nor ac-
ints him with them, yet if they be carried away, or
n, the Inn-keeper shall be charged, and therewith agrees
Edw. 3. 11. *a.* And altho' they who stole or carried away
Goods be unknown, yet the Inn-keeper shall be charged,
22 *H.* 6. 38. 8 *Rich.* 2. *Hostler* 7. *Vide* 22 *H.* 6. 21. But if
Guest's Servant, or he who (*b*) comes with him, or he
he desires to be lodg'd with him, steals or carries a-
his Goods, the Inn-keeper shall not be charged; for
the Fault is in the Guest to have such Companion or
nt; and the Words of the Writ are, *pro defectu hospi-
seu servientium suorum. Vide* 22 *H.* 6. 21. *b.* But if the
eeper appoints one to lodge with him, he shall answer
him as it there appears. The Inn-keeper (*c*) requires
Guest that he will put his Goods in such a Chamber un-
Lock and Key, and then he will warrant them, other-
not, the Guests lets them lie in an outward Court,
they are taken away, the Inn-keep. shall not *be charged,
Fault is in the Guest, as it is held 10 *Eliz.* (*d*) *Dy.* 266.
The Words are, *hospitibus damnum non eveniat*: These
ds are general, and yet forasmuch as they depend on
precedent Words, they will produce two Effects, *viz.*
hey illustrate the first Words. 2. They are restrained by
: For the first Words are, *Eorum bona & catal' infra hos-
illa existentia absque subtractione custodire*, &c. which
(*bona & catalla*) by the said Words, *ita quod*, &c.
bus damnum non eveniat, altho' they don't of their pro-
ature extend to (*e*) Charters and Evidences concern-
Freehold, or Inheritance, or (*f*) Obligations, or other
or Specialties; being Things in Action, yet in this
it is expounded by the latter Words to extend to them;
them great Damages happen to the Guest: And there-
if one brings a Bag or Chest, *&c.* of Evidences into the
or Obligations, Deeds, or other Specialties, and by
ult of the Inn-keeper they are taken away, the Inn-
shall answer for them, and the Writ shall be *bona
alla* generally; and the Declaration shall be special.
These Words, *bona & catalla*, restrain the latter

(*a*) Moor 78. pl. 207. 158. pl. 299. 2 Brown. 255.

(*b*) Cro. El. 285.

(*c*) Moor 158.

* Vide Salk. 18.

(*d*) Antea 32. a. b.

(*e*) 2 Roll. 58. 22 E. 4. 12. a. b.

(*f*) Dyer 5. pl. 2. 2 Rolls 58. Yelv. 68.

Words to extend only to Moveables: And theref. by the latter Words, If the Gueſt be beaten in the Inn, the Inn-keeper ſhall not anſ. for it; for the Injury ought to be done to his Moveables which he brings with him; and by the Words of the Writ, the Inn-holder ought to keep the Goods and Chattels of his Gueſt, and not his Perſon; and yet in ſuch Caſe of Battery, *hoſpiti damnum evenit*, but that is reſtrained by the former Words, as hath been ſaid. And theſe Words aforeſaid, *abſque ſubtractione ſeu amiſſione*, extend to all moveable Goods, altho' of them Felony cannot be committed; for the Words are not, *abſque felonica captione*, &c. but *abſque ſubtractione*, which may extend to any Moveables, altho' of them (*a*) Felony cannot be committed, as of Charters, Evidences, Obligations, Deeds, Specialties, *&c.*

(*a*) 3 Inſt. 109. 10 E. 4. 14. 2. Fitz. endictment 19. Br. Coron. 155

Trin

Trin. 29 Eliz. *Rot.* 721.

In the Common Pleas.

PAINE's *Case.*

BEtween (*a*) *Paine* Plaintiff in Treſpaſs, and *Sammes* and *Tanner* Defendants, for Treſpaſs done in Lands in *B.* in the County of *Eſſex*; on Not guilty pleaded, the Jurors gave a ſpecial Verdict to this Effect: A Man hath Iſſue two Daughters, the ſaid Lands in which, *&c.* were given to the elder Daughter, and to the Heirs of her Body begotten, the Remainder to the younger Daughter, and to the Heirs of her Body, *&c.* The elder Daughter took to Huſband the ſaid *Sammes*, one of the Defendants, who had Iſſue, which was heard cry, and died, and afterwards the elder Daughter died without Iſſue; after whoſe Death the ſaid *Sammes* held himſelf in, claiming to be Tenant by the Curteſy, upon whom the younger Daughter enter'd, and the ſaid *Sammes* and *Tanner*, as Servant to him, re-enter'd; upon which Re-entry, the younger Siſter brought the ſaid Action of Treſpaſs: And it was objected for the Plaintiff, that the Huſband in this Caſe ſhould not be Tenant by the Curteſy, becauſe the Eſtate of the Wife was determined, and the Eſtate of the Huſband, which was deriv'd out of the Eſtate of the Wife, could not continue longer than the Primitive Eſtate endured; for *ceſſante ſtatu primitivo ceſſat derivatus*; and therefore if (*b*) Tenant in Tail makes a Leaſe for Lives according to the Stat. of 32 *H.* 8. *cap.* 28. and afterwards dies without Iſſue, this Leaſe being deriv'd out of the Eſtate Tail, ſhall not continue longer than the Eſtate Tail, againſt the Opinion in 33 *H.* 8. 48. *a. Dyer*, *quod fuit conceſſum per totam Curiam*. And when the Wife dies without Iſſue, he in Remaind. will enter by Force of an immed. Gift to him, and his Iſſue will have a Formedon in the Deſcender upon an immed. Gift;

(*a*) 1 Ander. 184, 185. 1 Leon. 167, 168. Goldſb. 81, 82.

(*b*) Co. Lit. 45. b. Noy 6. 2 Roll. Rep. 491. Dyer 49. pl. 6. 1 E. 6. Br. Acceptance 19. B.N.C. 370.

and it is not like the Case of Dower; for the Wife shall be endowed altho' she hath no Issue; and theref. altho' the Estate determines or not for Want of Issue, yet the Wife by the Law shall be endowed; but a Man shall not be Ten. by the Curtesy unless he hath Issue, nor if he hath Issue, unless the same Issue or some other support the Estate which he shall hold by the Curtesy; and Dower is more favour'd than the Estate of a Ten. by the Curtesy; for a Wom. shall be endow'd of Lands where the Husb. had but a Seisin in (*a*) Law; but a Man shall not be Ten. by the Curtesy of Land unless the Wife was (*b*) actually seised in Deed. To which it was answer'd and resolv'd by the whole Court, That at the Com. Law, if (*c*) Lands had been given to a Wom. and the Heirs of her Body, and she had taken a Husb. and had Issue, and the Issue died, and the Wife also without Issue, whereby the Inher. of the Land did revert to the Donor, in that Case the Estate of the Wife is determin'd, and yet the Husb. shall be Ten. by the Curtesy, for that is *tacite* implied in the Gift. It is adjudg'd in 21 *H.* 3. (*d*) *Dower* 198. That if a Man hath Issue by a Wom. Inheritrix, which is dead, which Issue might inherit the Land, he shall be Ten. by the Curtesy, altho' the Wife by a former Husb. have Issue inheritable, and also tho' his Issue be dead. And therewith *Lit.* agrees, *l.* 1. *c. Dower fol.* 10. *b.* (*e*) In every Case where a Man takes a Wife seised of such Estate of the Tenem. so that the Issue which he hath by his Wife might by Possibility inherit the same Tenem. of such Estate as the Wife hath, as Heir to the Wife, in such Case, after the Death of the Wife, he shall have the same Lands by the Curtesy of *Eng.* otherwise not. By which Maxim it appears that the Seisin of the Wife ought to be of such Inher. which ought to have this Incident amongst others, that the Issue, which the Husb. shall have by her, may by Possibility inherit; and this may fail either in respect of the Issue, or in respect of the Manner of Inherit. In respect of the Issue, if it be born dead. As theref. *Glanvil, l.* 7. *c.* 18. *Si ex uxore sua hæred' habuerit filium vel filiam clamantem & auditum infra quatuor parietes*, &c. Bract. *l.* 5. *de except'*, c. 30. fol. 437, 438. *Si quis uxor' duxerit habentem hæredit' vel maritagium, vel aliquam terram causa dotionis, si liberos int' se habuerint ex istis nuptiis procreat', si uxor præmoriat', remanebit viro hæredit' & terra sua, tota vita ipsius viri, sive superst' fuerint liberi sive mortui, dum tamen semel aut vocem aut clamorem dimiserint, quod audiatur int' quatuor parietes hoc probet': Et licet partus moriat' in ipso partu, vel vivus nascatur vel forte semimortuus, licet vocem non emiserit, solent obstetrices fraud' veri hæred' protestari partum vivum nasci & legitim' ideo necesse est vocem probare; & licet naturalit' mutus nascatur & surdus, tamen clamorem emittere debet, sive masculus sit sive fœmina (unde versus) Nam dicunt E. vel A. quotquot nascuntur ab Eva.* And *Fleta, lib.* 6. *cap.* 56. and he agrees with *Bracton fere eisdem verbis.* So that *Littleton, lib.* 1. *cap.* 4. 7. *b.* might well say, (*) Some have said, That he shall not be Tenant by the Courtesy unless the Child which

(*a*) Co. Lit. 31. a. 358. b. F. N. B. 149. d. Perk. S. 304. Dr. & Stud. 84. a.

(*b*) Co. Lit. 29. a. 40. a. Perk. S. 457.

(*c*) Co. Lit. 30. a.

(*d*) Co. Lit. 30. a. Perk. S. 466.

(*e*) Co. Lit. 40. a. Lit. S. 52.

(*) Lit. S. 35. Co. Lit. 29. a. 30. a.

hath by his Wife be heard (*a*) to cry; for by the Cry it is prov- (*a*) 1 And. 35. Perk. S. 471.
ed that the Child was alive; *ideo quære*. But he saith before Co. Lit. 29. b.
in the same Chap. If the Husb. have Issue crying or alive; so 30. a. Dyer 25.
that in his Opin. the Crying is not necessary; for it is true, if pl. 159. O. Bend.
the Issue be born alive, it sufficeth, and the Crying of the 25. pl. 103.
Child is but a Proof that it is alive: And this is well prov'd
by the Form of Pleading, (which is the strongest Proof in Law)
for the Pleading in such Case is, *Quod quæd' A.G. fuit seisit' de te-* (*b*) Co. Lit. 29 b.
nement' præd' in d'nico suo ut de feodo, & sic inde seisit' cepit in vir'
J. W. per quod iidem J. & A. fuer' seisit' de tenement' præd' cum
pert' in d'nico suo ut de feodo in jure ipsius A. ipsiq; sic inde seisiti
existent' habuer' exitum inter eos, &c. *postea q; præd' A. uxor præd'*
J. obiit, idemq; J. ipsam supervix', & se ten' in tenem' præd' ac
inde fuit seisit' in d'nico suo, ut de lib' tenem', ut tenens inde per
leg' Angl'. And if in that Case Issue be taken, *quod non habuer' exitum*, &c. the Effect of the Issue shall be whether they had
Issue born alive, *quia mortuus exitus non est exitus*; and the
Crying is but a Proof of the Life. *Vid.* 28 *H.* 8. (*c*) *Dyer* 25. (*c*) Dyer 25.
But in the Case at Bar, to remove all Scruples, it was found pl. 159. O. Bend.
that the Issue was heard cry. And in this Case it was well 25. pl. 103.
observ'd, that *Glanvil*, *Bracton*, *Britton*, and *Fleta*, may be 1 And. 35.
vouched for Antiq. and Ornam. in Cases where they concur
with the later Authorit. of Law, and do not impugne the com.
Experience and Allowance in judicial Proceedings at this Day. (*d*) 10 Co. 73. a. Plowd. 357. a.
2. If the Wife be deliv. of a (*e*) Monster, which hath not the (*e*) Co. Lit. 29. b.
Shape of Mankind, it is no Issue in the Law; but altho' the
Issue have some (*f*) Deformity or Defect in the Hand or Foot, (*f*) Co. Lit. 29. b.
and yet hath human Shape, it sufficeth; and therewith agrees
Bracton ubi supra. *Item, si cum partum ediderit, tamen prius*
declin' ad monst', & cum clam' emitt' deber', emitt' rugit', & hinc
videt' quod ten' non debet exceptio (i. e. *ten' non deb' per leg' angl'*)
quia partus monstr' est cum non nascat' ut homo; Sed non dico part'
monstr' licet natura memb' minuer' vel ampliaverit, minuer', ut in
defect' digitor' vel hujusm', ampliaverit, ut si plur' digitos vel articul'
sicut sex vel plures, ubi non debet hab' nisi quinq; si inutila natura
redd' memb', ut si curvus fuer', vel gibbosus, vel memb' tortuosæ
habuer'. 3. In some Case the Time of the Birth is material,
and in some not; and therefore when the Lord *Dyer* was Serj.
he was (as he himself said in the C. Pleas) of Counsel with
this Case: One *Reppes* of *Norfolk* took to Wife an Inheritrix,
who was great with Child by him, and died in her Travail,
and the Issue was (*g*) ripped out of her Belly alive, and by (*g*) Co. Lit. 29. b.
Reference out of the Chanc. to the Just. they resolv'd, That he
should not be Tenant by the Curtesy, for it ought to begin
by Issue and be consummated by the Death of the Wife,

and the Eſtate of Tenant by the Curteſy ought to take away
(a) Co. Lit. 29.b the immediate Deſcent. But if a (*a*) Man hath Iſſue by his Wife, and afterw. Land deſcends to the Wife, be the Iſſue alive or dead at the Time of the Deſcent, he ſhall be Tenant by the Curteſy, for the Time of the Birth of the Iſſue is not material, if it be in the Life of the Wife. 4. In reſpect of the Manner
(b) Co. Lit. 29.b of Inheritance; as if (*b*) Lands be given to a Woman, and the Heirs Males of her Body, and ſhe takes a Huſb. and hath Iſſue a Daught. the Huſb. ſhall not be Tenant by the Curteſy; for the Iſſue cannot by any Poſſibility inherit the ſame Lands; and ſo out of the Rule of *Littl.* and of the Judgm. in 21 *H.* 3.
(c) Perk. S. 465. And at the Com. Law, (*c*) if Lands had been given to Huſb. and Wife, and to the Heirs of their two Bodies begotten, and they had Iſſue, and the Huſb. died, and ſhe took another Huſband and had Iſſue, the 2d Huſband ſhould be Tenant by the
(*) Poſtea 36. a. Curteſy; and ſo is it adjudged in * 30 *E.* 1. *Form.* 66. which proves that the Iſſue by the 2d Huſb. might poſſibly inherit;
(d) Co. Lit. 19.a for at the Common Law after Iſſue, it was taken to (*d*) three
1 Roll. 840. Purpoſes that the Tenant in Tail had a full Fee-ſimple, 1. To
2 Inſt. 334. alien. 2. To forfeit it by Attainder of Felony, as the Book is in 7 *E.* 3. 6, & 7. *b.* So that altho' the Tenant in Tail afterwards died without Iſſue, the Land ſhould not revert to the Donor. 3. That the Tenant in ſpecial Tail, by having Iſſue, had a full Fee-ſimple to make the Lands deſcendable to her
(e) Co. Lit. 19.a Iſſues by any other Huſband; For as by her (*e*) Alienation, ſhe might make Strangers to the Blood to be abſolutely inheritable; ſo by Conſtruction of Law, after Iſſue had, all lineal Heirs of her Body, by what Huſband ſoever they were begotten, ſhould inherit her, as a Benefit and Incident *tacite* annexed to her Eſtate by the Law; for it was ſaid, that by the having of Iſſue, it was a Gift and Diſpoſition in Law to the Huſband for his Life; which Diſpoſition and Alteration of the Eſtate, altho' it be for Life, *tacite* as an Incident to it, makes the Iſſue of the ſecond Huſband inheritable. As
(f) Co. Lit. 15.a. if a (*f*) Man hath Iſſue a Son and a Daughter by one *venter*, and a Son by another *venter*, and dies, if the elder Son makes a Leaſe for Life, againſt whom the Wife of the Father recovers Dower, and afterwards the elder Son dies, the Siſter ſhall have the Reverſion in Fee, becauſe the elder Son hath alter'd the Reverſion by his Leaſe for Life, and the Tenant in Dower leaves the Reverſion in the Leſſee for Life, *Vide* 7 *H.* 5. 4. But that the Iſſue of the ſecond Huſband ſhall inherit in ſuch Caſe, is directly prov'd by the Statute *de*
(g) 2 Inſt, 336. *Donis conditionalibus*, (*g*) *Nec habeat de cætero ſecundus vir hujuſmodi mulieris aliquid in tenemento ſic dato per conditionem poſt mortem uxoris ſuæ per legem Angliæ, nec exitus de ſecundo viro & muliere ſucceſſionem hæred*: For if the Iſſue of the 2d Huſb. ſhall not inherit, the 2d Huſb. ſhall not be Tenant by the Curteſy; as it was adjudged in the ſaid Caſe in 21 *H.* 3. And *Fleta*, *ubi ſupra*, ſaith, *Lex tamen iſta ad ſecun-*

ut viros non extenditur, eo quod palam inhibetur per statutum. But after Issue had, the Tenant in Tail at the Com. Law had not such a Fee-simple, that his (*a*) collateral Heir which is not Heir of his Body, should inherit. And if Land were given before the Stat. to Husb. and Wife, and the Heirs of their two Bodies, and they have Issue, and the Wife dies, and the Husb. takes another Wife, she shall be endowed, as it is held in 12 *H.* 4. 2. *Markham's* Case; and by Consequence the Issue, which she by Possibility might have, shall inherit the Land. And *vide Fitz. tit. Tail* 2. and mark the Agreem' of the Law in both the said Cases. And where *Littl.* saith, (*b*) as Heir to the Wife, these Words are very material; for that is the true Reason, that a Man shall not be Tenant by the Curtesy of a Seisin in Law, for in such Case the Issue ought to make himself Heir to him who was last actually seised, *&c. Vide* 11 *H.* 4. 11. 40 *E.* 3. 9, *&c.* And the Tenant by the Curtesy shall be attendant to the Lord paramount, which he cannot be, because the Wife died before she was actually seised: But Tenant in Dower shall not be (*c*) Attendant to the Lord paramount but to the Heir, and therefore she shall be endowed of a Seisin in Law. And the Case at bar is directly within the said Maxim, for the Issue of the Husband which he had by his Wife, might by Possibility have inherited the Wife. 2. It appears, That at the Com. Law the Husb. shall be Tenant by the Curtesy if he hath Issue, altho' afterwards the Wife dies without Issue, as it is adjudged in (*d*) 30 *E.* 1. *ubi supra*, and this Case is not restrained by the Stat. aforesaid. 3. *Litt. lib.* 1. *c.* 4. *fo.* 7. agrees with this Judgment, for he saith, That (*e*) Tenant by the Curtesy of *England* is, where a Man takes a Wife seised in Fee-simple, or in Fee-tail general, or as Heir of the special Tail, and hath Issue by the same Woman, Male or Female, heard or alive; be the Issue afterwards dead (*note that*) or alive, if the Wife dies, the Husband shall hold the Land during his Life by the Curtesy of *Engl.* So that it appears by him that it is not material whether the Estate Tail continues or not. 4. It appears, That the true Reason of *Dower* and the Reason of this Case, (*scilicet*) the Possibility of the Issue to inherit, *&c.* are all one. And if (*f*) Tenant in tail takes a Husb. and hath Issue and dies, now the Husb. is Tenant by the Curtesy; and altho' afterwards the Issue dies without Issue, so that the Estate Tail is determined; yet his Estate shall continue, for it is not deriv'd merely out of the Estate of the Wife, but is created by the Law, by Privilege and Benefit of Law *tacite* annexed to the Gift.

(*a*) Co. Lit. 19. a.

(*b*) Co. Lit. 40. a.

(*c*) 9 Co. 135. b. 1 Rol. 685.

(*d*) Antea 35. b.

(*e*) Co. Lit. 29. a. Lit. S. 35.

(*f*) Co. Lit. 30. a.

Paſch. 30 Eliz,

BARRETRY.

NOTA, On Evidence upon a Traverſe of an Indictment of Barretry, it was held *per Curiam*, that a common (a) Barretor is a common mover and ſtirrer up or maintainer of Suits, Quarrels, or Parties, either in Courts or in the Country: In Courts of Record, and in the County, Hundred, and other inferior Courts: In the Country in (b) three Manners: 1. In Diſturbance of the Peace. 2. In taking or detaining of the Poſſeſſion of Houſes, Lands, or Goods, *&c.* which are in Queſtion or Controverſy, not only by Force, but alſo by Subtilty and Deceit, and for the moſt Part in Suppreſſion of Truth and Right. 3. By falſe Invention, and ſowing of Calumny, Rumours and Reports, whereby Diſcord and Diſquiet ariſe between Neighbours. And all the ſaid Qualities of a common Barretor are prov'd by the Indictment of one for Barretry, and by our Books: For firſt it is ſaid in the Indictment, *Quod eſt communis Barrettator*, within which Word is included a Quarreller in his own Cauſe, and a Mover or Maintainer of Quarrels between others, for the moſt Part in Suppreſſion of Truth and Right: And this appears by the Statute of *Weſtm.* 1. (c) *cap.* 33. It is provided, That no Sheriff ſuffer any Barretors or Maintainers of Quarrels in their County-Courts, *&c.* In 40 *Edw.* 3. 33. *b.* the (d) Plaintiff counted in a *Decies tantum*, that the Recognitors in an Aſſiſe took of certain People who were Barretors and Embracers of the ſaid Suit, *ſcilicet*, of every one 20 *s.* which was in a Cauſe depending in a Court of Record. The Statute of (e) *Ragman*, the King wills and enjoins the Juſtices, that none in complaining nor in anſwering, be

(a) Co. Lit. 368. 2 Inſt. 175.

(b) Co. Lit. 368. a. b.

(c) 2 Inſt. 225.

(d) Fitz. Decies tantum 8. Br. Decies tantum 3.

(e) 3 Inſt. 175.

be not surprised nor encompassed by (*a*) Hocketors or Barretors; that the Truth be not followed, and the Trespasses remain unpunished. And the Stat. of *Westm.* 1. *c.* (*b*) 18. Forasmuch as the common Fine and Amerciament of the whole County in Eyre of the Justices for false Judgments, and other Trespasses is unjustly assessed by Sheriffs and Barretors of the Counties, so that the Sum is many Times increased, and the Parcels otherwise assessed than they ought to be, to the Damage of the People. And that will be sufficient to excite or maintain Quarrels in Courts: And for moving or maintaining Quarrels in the Country, *Littleton*, *lib.* 3. *cap. Warranty*, *fol.* 158. If (*c*) *A. de B.* be seised of a House, and *F. de G.* who hath no Right, enters in the same House, claiming the House to him and his Heirs, but the said *A.* continually dwells in the said House; in that Case the Possession of the Freehold shall be continually adjudged in *A. &c.* But if the said *F. G.* makes a Feoffment to certain Barretors in the Country, to have Maintenance of them in the same House, by a Deed of Feoffment with Warranty, by Force whereof *A. de B.* dares not stay in the said House, but goes out of it, *&c.* this Warranty commences by Disseisin. By all which, and by many other Authorities which might be cited it appears, That a common Barretor is a common Mover or Maintainer of Quarrels, either in Courts, or in the Country. If it be asked why this Busy Body is called Barretor? Some derive a (*d*) Barretor from the French Word (*Barrateur*) which signifies a Deceiver: Others, from the Latin Word (*Baratro*) which signifieth a vile Knave, or Unthrift: Others, because they maintain Pleas at Bars in Courts, or stir Causes of Suits, derive this Word (*Barretor*) from two legal Words; (*Barra*) which signifies the Bar in Courts, where Causes are debated, *&c.* and (*Rettum*) which, as appears in the Writ *de Homine Replegiando*, in the *Register*, signifies a Crime or Offence; and because a common Barretor is principally an Offender in moving or maintaining of Quarrels at Barrs, *scil.* in Courts, or in the Country, which are Causes of Suits in Courts, he is called a Barretor, or bar Offender. In the Civil Law, *Barratatia dicitur quando Judex petit aliquid indebitum ut Justitiam faciat.* But in the Law of *England*, this Word (*Barrett*) doth signify a Quarrel, whence he who moves or maintains Quarrels is called a Barretor, and it is so expounded by the whole Parliament, in 33 *E.* 1. *in Stat' de Conspir'* where the Act saith, Stewards and Bailiffs of Great Lords, who by their Seigniory, Office, or Power, take upon them to maintain or sustain Pleas or Barrets, for other Parties than those

(*a*) 3 Inst. 175. b.

(*b*) Postea 39. b. 3 Inst. 156, 158.

(*c*) Lit. 158. b. 159. a. Sect. 701. Co. Lit. 368. a. b.

(*d*) Co. Lit. 368. b.

those which touch their Lords or themselves. Where it is manifest that Barrets signifies Quarrels; but he ought to be *Communis Barrectator*, *scil.* not in one or two, but in many Causes, so that he may be proved a Common Barretor. 2. The Words of the Indictment are, *Pacis Domini Regis Perturbator*, *scil.* a common Mover or Maintainer of Brawls and Frays, by which the Peace is broken. The other Words of the Indictment are, *Communis Malefactor*, *Calumniator*, & *Seminator litium & discordiarum inter vicinos suos:* Malefactor, because he willingly and maliciously doth Wrong to his Neighbours, either openly after Warning, or secretly, as in the Night, *&c. quia* (a) *qui male agit odit lucem: Calumniator*, so called, because by false and malicious Scandals he endeavours to rob his Neighbour of his good Name, which is a great Motive of Discords and Quarrels, and is against the Law of God, *Levit.* 19. *Non facias Calumniam proximo tuo: Seminator litium & discordiarum inter vicinos*; and from such Seeds presently grow up many ill Herbs, *Inimicus homo superseminavit zizania.* And that is against the Commonwealth; for (b) *Expedit reipublicæ, ut sit finis litium.* And this Barretor is *Seminator litium*, &c. and that is likewise against the Law of God, *Levit.* 19. *Non eris susurro in populo.* In ancient Indictments, after these Words, *Pacis Domini Regis Perturbator*, these Words are added, *& Oppressor vicinorum suorum*, and that is either by Force, as in the Case of *Littleton*, in taking or keeping of Possession, or by Fraud and Malice, under Colour of Law, as by Multiplicity of unjust and feigned Suits, or by Information on Penal Laws, either in his own Case, or in malicious bringing of a special *Supplicavit*, or *Latitat*, of the Peace; and all this by Fraud and Malice, to enforce the poor Party *ad redimendam vexationem*, to give him Money, or to make other Composition; and this is the most dangerous Oppressor, for he oppresses the Innocent by Colour and Countenance of the Law, which was instituted to protect the Innocent from all Oppression and Wrong: And therefore the said Words in the old Indictments (if the Truth of the Case be such) are material to be inserted in the Indictment of Barretry.

(a) 9 Co. 66. 2. Postea 127. 2.

(b) 5 Co. 73. 2. 6 Co. 7. 2. 9 Co. 79. b. Postea 98. b. Co. Lit. 103. a. 2 Inst. 411.

Trin

Trin. 30 Eliz. *Rot.* 1012.

In the Common Pleas.

GRIESLEY's *Case.*

IN a Replevin brought by *Thomas Kingſton* againſt *Richard Baily* the Elder, and *Richard Baily* the Younger, in a Place called *Stockings* in *Kingſton*, in the County of *Stafford*; the Defendants, as Bailiffs to *Thomas Grieſley*, Eſq; did acknowledge the taking of the ſaid Cattle in the ſaid Place, where, *&c.* For they ſaid, That the ſaid Place, where, *&c.* contained ſix Acres; and that the ſaid *Thomas Grieſley* was ſeiſed of the Manor of *Kingſton*, within which Manor, the ſaid Place where, *&c.* is, in his Demeſne as of Fee, and preſcribed to have *Curiam viſus franc' pleg' coram ſeneſchallo ſuo infra manerium illud tenend' bis per annum, viz. ſemel infra menſem proximum poſt feſtum Paſchæ, & iterum infra menſem proximum poſt feſtum Sancti Michaelis Archangeli de omnibus inhabitantibus & reſidentibus infra manerium prædict' tanquam ad manerium illud pertin': quodque infra manerium præd' habetur, & a tempore cujus contrarii memoria hominum non exiſtit, habebatur talis conſuetudo, quod inhabitantes & reſidentes infra manerium præd' ad inquirendum & præſentandum ea quæ ad viſum fran' plegii pertinent onerati & jurati, annuatim, ad Curiam viſ' franc' plegii illius apud manerium illud, infra menſem proxim' poſt feſtum Sancti Michaelis Archangeli tent', elegerunt & eligere conſueverunt unum idoneum hominem de inhabitantibus infra manerium prædict' ad eſſendum Conſtabularium de Kingſton pro ann' tunc proxim' ſequen', qui quidem homo ſic electus officium* Co. Ent. 572. pl. 2. Sav. 93. 94.

cium illud pro uno anno exercere per totum tempus prædᵗ consuevit, & si præsens fuerit hujusmodi electioni tunc per totum tempus prædᵗ jurari consuevit per seneschallum curiæ prædᵗ in aperta curia ad officium illud exercendum. And that at the Court of View of Frankpledge held at the said Manor, 5 *Octob.* 28 *Eliz.* before *John Newport*, then Steward of the said *Thomas Griesley* of the said Court, the said *Thomas Kingston* being an Inhabitant within the said Manor, was, according to the said Custom, chosen to be Constable of *Kingston, prædᵗ pro uno anᵒ tunc proximᵒ sequenᵗ* by the Jurors and Presenters of the said Court, and he being present in Court was charged by the said Steward to take the said Oath, which he utterly refused to do, and departed in Contempt of the Court, *ob quod prædᵗ Johannes Newport, adtunc seneschallus ejusdem Curiæ finem Centum solidorum super prædᵗ Thomᵉ Kingston adtunc in eadem Curia imposuit.* And because the said Fine of 5 *l.* was not paid to the said *Tho. Griesley*, the Defendants made conusans, as Bailiffs of the said *Tho. Griesley*, of the Distress of the Plaintiff's Cattle, in the Place where, *&c.* upon which the Plaintiff did demur in Law: And in this Case these Questions were moved and debated; 1. Whether the Steward might impose a Fine in this Case. 2. Whether this Fine ought to be affered or not. 3. Whether the Lord of the Leet might distrain for such Fine, without a Custom enabling him so to do. As to the first it was resolved, *per totam Curiam*, That if any Contempt or Disturbance to the Court be committed in any Court of Record, that the Judges might set upon the Offender a reasonable Fine, and a Leet is a Court of Record, and the Steward is Judge there; and therefore, if any Contempt (*a*) or Disturbance to the Court be made before him, he may set a reasonable Fine upon the Offendors: As if the Bailiff of a Leet refuses in Court to execute his Office, the Steward may set a reasonable Fine upon him; and therewith agrees the Book in (*b*) 7 *H.* 6. 12. *b.* So if a Tithingman refuses to make a Presentment in a Leet, the Steward shall set a reasonable Fine upon him, as it is held in (*c*) 10 *H.* 6. 7. *a.* So if one of the Jurors in a Leet departs without giving his Verdict, he shall be fined by the Steward, as appears in the Book of *Entries*, Title *Amerciament in Debt, fol.* 149. *Et sic de Similib'.* But Courts which are not of Record cannot impose a Fine, or commit any to Prison. As to the second, it was objected, That the Fine in the Case at Bar ought to be affered; and to prove that, the Statute of *Magna Charta cap.* 14. *Liber homo non amercietur pro parco Delicto nisi* (*d*) *secundum modum illi' delicti, & pro magno delicto secundum magnitudinem delicti, salvo, &c. & nulla prædᵗ misericordia*

(*a*) Dy. 211. pl. 31. 233. pl. 14. Owen 113. Moor 470. 1 Roll. Rep. 33, 74. 2 Roll. Rep. 3. Cro. El. 241, 581. Cr. Car. 567.

(*b*) 11 Co. 43. b. 2 Roll. Rep. 3. Br. Det. 85. Br. Leet 14, 36.

(*c*) Br. Leet 36. Br. Leygager 99. 2 Roll. Rep. 3. 11 Co. 43. b.

(*d*) 11 Co. 43. a. 44. a. 13 Co. 3. Selden's Table Talk, Fines 61. F. N. B. 75. a.

rum ponatur niſi per Sacrum' probor' & legal' Hom' de vicineto: Comites autem & Barones non amercientur niſi per pares ſuos, &c. And by the Stat. of *Weſt.* 1. (*a*) *c.* 6. it is provided, No City, Borough, or Town, nor any Man, ſhall be amerced without a reaſonable Cauſe, and according to the Quantity of the Treſpaſs; a Freeman, ſaving his Contenement, a Merchant ſaving his Merchandize, and a Villain ſaving his Gainage, and that by their Equals. And (*b*) 10 *E.* 3. 9, and 10. was cited, and ſtrongly urged, where the Caſe was, That *William Freeman* brought a Replevin againſt the Abbot of *Ramſey*, and others, that they had wrongfully taken his Cattle, *&c.* The Abbot avowed the taking, by reaſon he is Lord of the Hundred of *F.* within which Hundred he hath a Leet in the Town of *M.* (where the Plaintiff is reſiant) to hold once a Year, *ſcil.* every Year after the Feaſt of St. *Michael*, when he will warn it, *&c.* and at the Leet warned and held there at ſuch a Day, *&c.* twelve were ſworn to preſent Things preſentable, which belong'd to their Oath, and that the ſaid *William* was one of them; and after they had received the Articles, they were commanded to anſwer to the Articles, and to preſent, *&c.* and they refuſed; for which Cauſe the ſaid *William*, and the others were amerced, and the Amercement of him was affered to half a Mark; and for the ſaid half Mark he did avow: And there Exception is taken by *Aſhton* to the Avowry, becauſe the Amercement was upon them all in Common, and the Afferance of the Amercement was ſeveral, *ſcil.* upon *William* half a Mark, *&c.* *Parning*, It ſhould be thus according to Law, for becauſe all refuſed all ſhall be amerced, but every one ſhall be affered by himſelf, *ſecundum quantitatem delicti*; as in Aſſiſe of *Novel diſſeiſin* all the Diſſeiſors ſhall be amerced, and affered each by himſelf. *Aſhton*, If a Decenary or a Town is amerced in Eyre, the Afferement ſhall be in Common, *&c.* *Parning*, It is not like the Caſe, for when a Decenary or Town is amerced, there is no certain Perſons named, as there is in this Caſe; and the Avowry was awarded to be good: By which it appears, that a Fine impoſed for a Contempt in Court ought to be affered. To which it was anſwered and reſolved, That in the Caſe at Bar, the Fine impoſed by the Steward was well enovgh without any Afferance, and therefore a (*c*) Difference between a Fine and an Amercement; for a Fine is always impoſed and aſſeſſed by the Court, but an Amercement, which is called in Latin *Miſericordia*, is aſſeſſed by the Country. And this Word (*afferer*) is as much as to ſay, *ponere in certitudinem, ſeu taxara, ſcil.* to aſſeſs or tax, and the Afferance as much as to ſay Aſſeſſment, or Taxation. And Afferors are Aſſeſſors, or Taxers, and are derived from this ancient *French* Word (*afferer*) which ſignifies *taxare*, &c. And this appears by the Stat. of

(*a*) 2 Inſt. 169, 170.

(*b*) 11 Co. 43. a. Poſtea 40. b. 1 Roll. Rep. 73.

(*c*) 11 Co. 43. b. Co. Lit. 126. b. Br. Amerciament 25, 65. Kelw. 65. a. Palm. 7. Cro. Car. 275. Cart. 28. 2 Inſt. 196. 10 H. 6. 7. b Cro. El. 241. 1 Roll. Rep. 74.

(a) Antea 37. a. 2 Inſt. 196, 197. of *Weſtm.* 1. c. (*a*) 18. whereby it is enacted, That Amercements before Juſtices in Eyre, *&c.* ſhall be aſſeſſed by the Oaths of Knights and of honeſt Men; where this Word aſſeſſed is as much as to ſay affered. And the Statutes of *Magna Charta*, and *Weſtm.* 1. (*b*) extend to Amercements, and not to Fines; for Amercements ought to be affered, or taxed, or aſſeſſed *per Pares*, as if the Demandant or Plaintiff be Nonſute, or if Judgment be given againſt the Tenant or Defendant, or upon the Bail becauſe the Principal doth not appear, or upon the Plaintiff *quia non eſt proſecut'*, or *pro falſo clamore*, or the like, *&c.* the Juſtices ſhall never aſſeſs any Amercement, but by the ſaid Statutes they ought to be aſſeſſed *per Pares.* But the Court in ſuch Caſes ſaith, *Ideo in miſericordia* generally, without taxing or aſſeſſing any Sum certain; and the (*c*) Clerk of the Warrants in the Com. Pleas makes Eſtreats of theſe Amercements, and delivers them to the Clerk of the Aſſiſe within every Circuit, to deliver them to the Coroners in every County to affere, *i. e.* to aſſeſs the Amercements, which they do accordingly; and ſuch Aſſeſſment by the Coroners in every County hath been held a Satisfaction of the ſaid Stat. of *Magna Charta*, by which it is enacted, *Quod nulla pred' miſericordiarum ponatur niſi per Sacrum' probor' & legal' Hom' de vicineto:* And the Coroners of the County were thought moſt indifferent, becauſe they are choſen by the whole County: But if a Man be Nonſuit after the Jury be ready to give their Verdict, the Court may cauſe the Amercement to be preſently affered in Court by the ſame Jury, as it is held in (*d*) 18 *Ed.* 3. 13. *a.* And it ſeems the Stat. of *Magna Charta* was but an Affirmance of the Com. Law, for *Glanvile*, who wrote in the Time of *Hen.* 2. *Lib.* 9. *cap.* 11. ſaith, *Eſt autem miſericordia Domini Regis, qua quis per juramentum legalium hominum de vicineto eatenus amerciandus eſt, ne aliquid de ſuo honorabili contenemento amittat.* And *Fleta*, *Lib.* 1. *cap.* 48. recites the Statutes of *Magna Charta*, and *Weſtm.* 1. *Liber Homo non amercietur, &c. niſi per Sacrum' Parium ſuorum, viz. probor' & legal' Hom' de vicineto, qui facultatum ſuarum noticiam habeant pleniorem.* And *Bracton*, *Lib.* 3. *c.* 1. *fol.* 116. *b.* ſays, *De illis qui ſunt in miſericordia Dom' Regis, & non ſunt amerciati, ad hoc videndum qualiter quis ſit amerciand'. Et ſciendum eſt, quod miles & liber homo non amerciabitur niſi ſecundum modum delicti, ſecundum quod delictum fuit magnum vel parvum & ſalvo Contenemento ſuo; mercator vero non niſi ſalva merchandiza ſua: Et villan' autem, non niſi ſalvo wainagio ſuo: Et hoc per judicium proborum Hom' de viſneto qui affidabunt ſimulcum ſerviente. Comites vero, vel Barones*

(b) 2 Inſt. 27.

(c) F. N. B. 76. a

(d) 11 Co. 43. b.

non

non sunt amerciandi, nisi per pares suos, & secundum modum delicti, & hoc per Barones de scaccario, vel coram ipso Rege. * *Clericus vero non amerciabitur secundum beneficium suum Ecclesiasticum, sed secundum quantitatem laici feodi sui, & secundum modum delicti: Et ad hoc fideliter faciendum affidabunt Amerciatores quod neminem gravabunt per Odium, nec alicui deferent propter amorem, & quod celabunt ea quæ audiverunt.. Vide* 38 *Ed.* 3. 31. *a.* (*a*) 9 *Hen.* 6. 2. *b.* 19 *E.* 4. 9. *a.* 21 *Ed.* 4. 77. *b.* An Earl, Baron, and Bishop shall be amerced 100 *s.* and 19 *Ed.* 4. 9. A Duke to 10 *l.* *Vide* (*b*) 1 *Hen.* 6. 7. *b.* in the Earl of *Northumberland*'s Case. Note, that altho' the Stat. of *Magna Charta c.* 14. be in the Negative, *Comites & Barones non amercientur nisi per pares suos, & non nisi secundum modum delicti*, yet (*c*) Usage hath reduced it to a certainty. But note, Reader, as to Amerciaments, this Difference between Amerciaments in Actions real or personal, of the Demandant, or Tenant, *&c.* or upon a Presentment or Indictment, as for not repairing a Bridge, or a Highway, *&c.* and the like; for as it is aforesaid, such Amercements, according to the said Acts, ought to be affered *per pares*; and Amercements of any who hath Administration of Justice, or of any Officer or Minister who hath the Execution of the King's Writs, &c. for such Amercements shall be assessed by the Justices or Judges of the Court where the Cause depends. And there are two Reasons of this Difference. 1. These later Sorts of Amercements are out of the said Statutes of *Magna Charta* and *Westm.* 1. for two Reasons. 1. The Words are (*d*) *Liber homo non amercietur*, &c. extend to private Men, and not to those who have Administration of Justice, nor to Officers or Ministers who have Executions of the K's Writs, &c. 2. The Words are, *Per Sacrm' proborum & legalium Hom' de vicineto*, which may have knowledge of the Abilities of the Parties, as *Fleta* saith, but that doth not extend to the Offences of Commission or Omission done by those who have Administration of Justice, or by Officers and Ministers who have Execution of Writs, &c. which Offences are done to the Court itself, and theref. by the Court ought to be affered and assessed. The 2d Cause of the said Diff. is, *Quia eventus judiciorum sunt incerti*, and the Plaint. or Defen. may have a probable Cause of Sute or Defence 'till he hears what the adverse Party can alledge and prove to the Contrary; and theref. it is great reason that such Amercements which arise upon such Causes should be affered *per pares* in the Country, according to the said Statutes, and not by the Court. But the Offence of one who hath the Administrat. of Justice, or of an Officer or Minister who hath Execut. of the K's Writs, in point of his Office, is *malum in se*, and hath not any Probab. or Colour of Excuse; and yet both the Kinds of Amercements are stiled with this Word, *scil. misericordiæ*, because whosoever hath the affering of them, ought

* F. N. B. 76. b.

(*a*) Br. Amerciament 2. 47. Br. Nonsuit 62. Br. Amercement 48. 6 Co. 45. a. 54. a. 2 Inst. 28.

(*b*) Br. Amercement 33. 11 Co. 43. b.

(*c*) 2 Inst. 28.

(*d*) 2 Inst. 27.

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to uſe great Moderation: And this Diff. appears in our Books, and theref. in 22 *Ed.* 3. 2. *a.* *John* of *London*'s Caſe, in a falſe Judgment, if the Judgm. be reverſed, the Suiters, who were the Judges, ſhall be amerced, and this Amercement ſhall be affered by the Juſtices, for the Suiters had the Adminiſtration of Juſtice; and therewith agrees the Book of Entries, *titulo Falſe Judgment, pl.* 13. *Et quod ſectatores Curiæ prædictæ ſunt in miſericordia, quæ afferatur per Curiam domini Regis hic ad*, &c. And if the Sheriff returns, *Cepi corpus*, and hath not the Body at the Day, the Entry is, *Ideo idem Vicecomes in miſericordia, & afferatur per Juſtic' hic ad*, &c. And therewith agrees the Book of Entries, *Capias* 19, 20. So if a Writ be delivered of Record to the Sheriff to be executed, *& Vicecomes non miſit Breve*, the Record ſaith, *Ideo Vicecomes in miſericordia, & afferatur per Juſticiarios ad*, &c. and this appears in the ſaid Book, *Record* 2. So if a *Habeas Corpus* be directed to a Sheriff, Gaoler, or Keeper of a Priſon, &c. and he brings not the Body, &c. the Entry is, *Ideo idem A. in miſericordia, & afferatur per Juſtic' ad*, &c. *Et ſic de Similib'*. And in *L.* 5 *E.* 4. 6. *a.* it is reſolved by the Juſtices, That that which is aſſeſſed on an Officer or Miniſter of the Court, is called an Amercement, and not a Fine, but on a Stranger to the Court for a (*a*) Miſdemeanor it is called a Fine, and not an Amercement. But upon a Nonſuit in a real or perſonal Action, or Bar to the Demandant or Plaint. or Judgment againſt the Ten. or Defen. the Entry is *Ideo in miſericordia* generally, and that ought to be affered *per pares*, F. N. B. 76. So if *A.* be amerced on a Preſentment, for not repairing a Bridge, or a Highway in a Leet; *Ideo A. in miſericordia, & amerciamentum inde afferatur per afferatores in eadem Curia adtunc electos & juratos ad*, &c. *Vide* the Book of *Entries*, *Title Treſpaſs in Amercements* 2. So if one be amerced for Default of Suit at a Leet, the Amercment ought to be affered *per probos & legales homines*, Book of *Entries*, *Repl' Amercement* 2. And as to the ſaid Book of (*b*) 10 *E.* 3. 9. it appears, That the Amercement was affered, but it doth not appear by whom it was affered or aſſeſſed, and therefore it ſhall be intended to be done by the Steward; for in Truth it was a Fine: And it is to be known, That if a Jury, or a Leet, tax an Amercement, it is ſufficient without other afferement; for the Amercement is the Act of the Court and the Afferement of the Jury, and therewith agrees 8 *H.* 7. 4. *Vide* 7 *Ed.* 3. 15. *b.* *Aſtlie*'s Caſe. 45 *Ed.* 3. 26. *b.* 27. *a.* But if the Steward afferes an Amercement upon the Preſentment of the Jury it is void, and ſhall not bind, *vide* 45 *E.* 3. 27. But the Court ſhall aſſeſs Fines, and they ſhall not be affered by any others, unleſs it be in ſpecial Caſes; and that not only upon Contempts and Miſdemeanors done in Court, but upon Writs of *Capias pro fine*, or upon Confeſſions, &c. as appears *Trin.* 22 *Hen.* 7. *Rott.* 510. in

(*a*) Br. Fine pour Contempt. 39. Br. Amercement 46.

(*b*) 10 E. 3. 9, 10. Antea 39. a. 11 Co. 43. a. 1 Rolls Rep. 73.

Communi Banco, where he who was taken by *Capias pro* prayed that he might be admitted *ad finem suum cum reg' faciend', & admittatur pro* 5 s. *solut' hic in cur' ad* J. R. *Cler'* Rob' Read *capit' Justic' dom' reg' hic in partem pro reparatione & emendatione cistarum pro record' de tran- in eisdem custod' ordinat' ex præcepto curiæ.* And *Trin.* 8. *Rot.* 306. in the like Case, & *super hoc finis eorundem* J. *occasione præd' afferatur per Justic' hic ad* 2 s. &c. But Juror appears, and is adjourn'd upon a Pain, and makes default, in that Case, because he shall be fined according to the yearly Value of his Land, it shall be enquired of by the other of his Companions of the Jury; for in such Case the Court cannot know it, and therewith agrees 4 *Ed.* 4. 6. 9 *H.* 4, 5. (a) *Vide* 20 *Ass. pl.* 11. And (b) *finis dicitur quia finem litibus imponit*, and is not traversable, as it is held in 5 *H.* 6. 13. *a. i. e.* the Party redeems his Offence for a Sum of Money, and which makes an End of it, and of his Imprisonment for it, and for that Reason it is called also *Redemption*, as appears in the Judicial Register 31. *ad satisfac' inde de Redemptione sua pro quadam transgress.* &c. And this Writ is called *Capias pro fine*, which Fine is expressed in the Writ by this Word *Redemption*; and the Stat. of *Marlebridge*, cap. 3. (c) *Non ideo puniatur Dominus per redemptionem, i. e. per finem.* Another Difference is, if a Man be convicted before the Sheriff in the County of a (d) Recaption, he shall be only amerced, but if he be convicted thereof in the Com. Pleas, he shall be fined; and the Reason of this Difference is, because the County Court is not a Court of (e) Record, and therefore cannot impose a Fine; for no Court can fine but such Court which is a Court of Record. *Vide F. N. B.* 73. *d.* And by these Differences you will the better understand your Books, which are plentiful in these Matters. As to the third Point it was objected, that for an Amercement of Things presentable in the Leet, the Lord may (f) distrain, but not for a Fine imposed by the Steward; but of that an Action of Debt lies. To that it was answer'd and resolv'd, That there are two Manner of Offences, some done out of Court and some done in Court; of those which are done out of Court, the Jurors of the Leet have Conusance, and therefore Power to present them, and to assess an Amercement for them, but for Contempts (g) and Misdemeanours in Court before the Steward himself, he hath Conusance of them, and therefore may impose a Fine for them, and thereof need not make Enquiry; so that those who have Conusance of the Thing are fit to impose a Fine or Amercement for the same Thing; and if for the Less, (h) for an Amercement of Offences out of Court a (h) Distress shall be incident of common Right, *a fortiori*, for Fines imposed for Offences done in the very Court

(a) Br. Amercement 55. 60. Br. Challeng. 109. in Fine.

(b) Co. Lit. 120. b 262. a. 3 Bulst. 144 Hard. 121.

(c) 2 Inst. 107.

(d) 11 Co. 43. b. Postea 60. b. 120. a. F. N. B. 73. d.

(e) Postea 60. b. 120. a.

(f) Cr. Jac. 382. 1 Rolls Rep. 201. Cr. Car. 533. 1 Rolls 665.

(g) Cr. Eliz. 241 Dyer 233. pl. 14. 211. pl. 31. Owen 113. Moor 470. Cr. El. 581. 2 Rol. Rep. 3. Cr. Car. 567. 1 Rolls Rep. 33. 4.

(h) 11 Co. 45. a. 1 Rolls 665. 1 Rol. Rep. 201. Dr. & Stud. 74. a. Cr. Jac. 382.

a Diſtreſs ſhall be incident, *quia quod licitum eſt pro minore, & pro majore licitum eſt*; and a Fine is more than an Amercement, and both impoſed by Authority of the Leet: And as nothing is more naturally to be puniſhed by the Court Leet than Offences committed in the Court itſelf, ſo for no Sum impoſed for any Offence, by Authority of the Leet, a Diſtreſs is more incident than for ſuch as is impoſed for Offences done in the Court itſelf. *Vide* 8 *Rich.* 2. *Avowry* 194. 41 *Ed.* 3. 26. 45 *E.* 3. 8. 47 *E.* 3. 12. 2 *H.* 4. 24. 11 *H.* 4. 89. 7 *H.* 6. 12. 10 *H.* 6, 7. 12 *H.* 7. 15. 3 *H.* 7. 4. 21 *H.* 7. 40. *F. N. B.* 100. 23 *H.* 8. *Br. Leet.* 37. And it would be hard to drive the Lord to his Action of Debt for every ſmall Fine or Pain, but the Lord may diſtrain and ſell them, or diſtrain and put them in the Pound, at his Pleaſure.

Note, Reader, The ſaid Cuſtom, *&c. Eligere unum idoneum hominem de inhabitantibus infra manerium ad eſſendum Conſtabularium*, &c. well agrees with the Law; for the Com. Law requires, that every Conſtable ſhould be *idoneus homo*; *i. e.* apt and fit to execute the ſaid Office; and he is ſaid in Law to be *idoneus* who has theſe three Things, Honeſty, Knowledge, and Ability; Honeſty, to execute his Office truly without Malice, Affection, or Partiality; Knowledge, to know what he ought duly to do; and Ability, as well in Eſtate as in Body, that he may intend and execute his Office, when need is, diligently; and not for Impotency or Poverty to neglect it; for if poor Men ſhould be choſen to this Office, who live by the Labour of their Hands, they would rather ſuffer Felons and other Malefactors to eſcape, and neglect the Execution of their Office in other Points, than leave their Labour, by which they, their Wives and Children live: And the Commonwealth conſiſts in the well ordering of particular Towns, and Order will not be well obſerv'd in them but where the Officers are *idonei*, *i. e.* Honeſt, Knowing, and of Ability. And this Word *(a) idoneus* is oftentimes in Law attributed to thoſe who have any Office or Function; and therefore if a *(b)* Coroner, who is alſo an ancient Officer, be *(c) minus idoneus ad Officium illud exequendum*, it is a good Cauſe to remove him. *F. N. B.* 163, 164. *Regiſter* 177. *i. e.* If the Coroner be *(d) ſenio confractus, aut morbo paralyſis percuſſus, aut terras & tenementa in eodem Comitatu non habet, aut electus eſt in officio Vicecomitis*, &c. for he ought to be choſen Coroner, *qui melius ſciat, & poſſit officium illud intendere*, as appears by the Words of the Writ *de Coronatore eligendo*, *F. N. B.* 163. *Regiſt.* 177. And ſo he who is Conſtable ought to be *idoneus*, i. e. *qui melius ſciat & poſſit Officium illud intendere.* And in Letters Patents of incorporating of Inhabitants of a Town into

(a) 5 Co. 57. b. 2 Inſt. 631, 632.

(b) 5 Co. 57. b.

(c) F. N. B. 163. n.

(d) F. N. B. 163. r.

into Mayor, or Bailiff and Burgeſſes; the Words are, *Quod ipſi de ſeipſis eligere poſſunt unum hominem idoneum*, or, *duos homines idoneos*, &c. and the Law requires, that he whom the Patron preſents to a Benefice be *perſona idonea*, for the Words of the Writ of *Quare impedit* are, *Preſentare idoneam perſonam ad Eccleſiam de*, &c. *& proprie dicuntur idonei, qui poſſunt & volunt in Eccleſiis deſervire*, ſcil. *qui moribus, honeſtate, & literarum ſcientia ſunt decorati.* And if one be elected Conſtable who is not *idoneus*, he by the Law may be diſcharged of his Office, and another Man who is *idoneus* appointed in his Place.

Hill. 45 Eliz.

WHITTINGHAM's *Case.*

THE Case in the Star-Chamber, Hill. 45 Eliz. was, That *Richard Whittingham* was seised of three Messuages, *&c.* in *Craford*, in the County of *Kent*, held of the Queen in Socage, as of the Manor of *Newbery* in *Craford* in Fee; and by his Will in Writing devised them to *Prudence*, his Bastard Daughter, and her Heirs, and died. *Prudence*, being within Age of 21 Years, by Deed, as was pretended, did enfeoff *Stephens* and others of the said Tenements in Fee, and died within the Age without Issue, and whether this Feoffment should prevent the Queen of her Escheat was the Question; and on Consideration had with the two Chief Justices, it was resolv'd, That if there be Lord and *(a)* Infant-tenant, and the Infant makes a Feoffment in Fee, and executes it by Livery of Seisin by his own Hands, and afterwards dies without Heir, that the Lord should not take Benefit of any Escheat in that Case. And as to that, it is to be known, that there are three Manner of *(b)* Privities; *scil.* Privity, in Blood; Privity in Estate; and Privity in Law. Privies in Blood are meant of Privies in Blood inheritable, and that is in three Manners, *sc.* inheritable as General Heir; inheritable as Special Heir, and inheritable as General and Special Heir. Privies in Estate are, as Joint-tenants, Husband and Wife, Donor and Donee, Lessor and Lessee, *&c.* Privies in Law are, when the Law without Blood, or Privity of Estate, casts the Land upon one, or makes his Entry lawful; as the Lord by Escheat, the Lord who enters for Mortmain, the Lord of a Villain, *&c.* And first, Privies *(c)* inheritable, as General Heir, shall take Benefit of Infancy; and therefore if an Infant, Tenant in Fee-simple, makes a Feoffment and dies, his Heir shall enter.

(a) Dyer 10. pl. 38. 4 Co. 125. a 7 Co. 7. b. Post. 45. a. 2 Inst. 483. 49 E. 3. 13. a. 39 H. 6 42. b. 7 H. 5. 9. b. 3 Bulstr. 272.

(b) Co. Lit. 271. a 1 Jones 32. 3 Co. 23. a. 4 Co. 123. b 124. a. 2 Inst. 516. 517.

(c) 3 Bulstr. 272. 2 Inst. 483. 1 Rolls Rep. 401 Palm. 234. 254.

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The ſame Law of him who is Heir General and Special: As if a Man gives Land to one and the Heirs Males of his Body, and the Donee within Age makes a Feoffment in Fee, his Son, who is Heir General and Special, ſhall enter: The ſame Law of him who is ſpecial Heir, and not general; as if in the ſame Caſe the Donee had Iſſue two Sons, and the elder had Iſſue a Daughter, and the Donee died, and the elder Son, within Age, made a Feoffment, and died without Iſſue Male, the younger is Special Heir *per formam doni*, and ſhall avoid his Brother's Feoffment, altho' he be not General Heir, becauſe he is Privy in Blood, and has the Land by Deſcent: So if Lands be given to one, and the Heirs (*a*) Females of his Body, and the Donee having Iſſue a Son and Daughter, makes a Feoffment within Age and dies, the Daughter being Heir Special, (to whom the Right of Entry deſcends) ſhall enter, and not the Son, who has nothing by Deſcent: So of the Heir in (*b*) Borough *Engliſh*; for in all Caſes, when any claims by Deſcent, as Special Heir, he ſhall take Benefit of a Right of Entry, which deſcends to him for the Infancy of his Anceſtor: The ſame Law if his Anceſtor were *Non compos mentis* at the Time when he made the Feoffment, becauſe in theſe and the like Caſes the Heir General cannot enter, becauſe no Right or Title deſcends to him, but the Right deſcends to the Special Heir. So if Tenant in Tail, within Age, makes a Feoffment in Fee, and is (*c*) attainted of Felony, in that Caſe the Iſſue ſhall enter for the Infancy, yet he is not General Heir, for the Blood is corrupted.

(*a*) Co. Lit. 337. b

(*b*) Co. Lit. 337. b

(*c*) Co. Lit. 337. a. Palm. 254.

Alſo Privies in (*d*) Eſtate (unleſs it be in ſome ſpecial Caſes) ſhall not take Advantage of the Infancy of the other. And therefore, if Donee in Tail within Age makes a Feoffment in Fee, and dies without Iſſue, the Donor ſhall not enter, becauſe there was Privity betwixt them only in Eſtate, and no Right accrued to the Donor by the Death of the Donee. So if (*e*) two Joint-tenants be in Fee, within Age, and one makes a Feoffment in Fee of his Moiety, and dies, the Survivor cannot enter by Reaſon of the Infancy of his Companion, for by his Feoffment the Jointure was ſevered ſo long as the Feoffment remains in Force; and therefore in ſuch Caſe the Heir of the Feoffor ſhall have *Dum fuit infra ætatem*, or ſhall enter into the Moiety: But if (*f*) two Joint-tenants be within Age, and they join in a Feoffment, in ſuch Caſe a Joint-right remains in them, and therefore if one dies, the Right ſhall ſurvive, and the Survivor ſhall have the Right of the Land as from the firſt Feoffor: And thereof. I conceive with *Littl. cap.* (*g*) *Diſcont.* 44. that the Survivor may enter in reſpect of the Right accrued to him, otherwiſe this Miſchief will follow, That the Heir of that Feoffor who died can't enter, becauſe the Right doth ſurvive, nor ſhall

(*d*) 4 Co. 124. a. 1 Rolls Rep. 401. 442. 3 Bulſt. 272. 2 Inſt. 483.

(*e*) Co. Lit. 337. b. 39 H. 6. 42. b. 1 Roll. Rep. 401.

(*f*) 1 Rolls Rep. 401. Lit. §. 634. Co. Lit. 337. a. Palm. 254.

(*g*) Lit. §. 3. §. 64. Lit. fol. 142. a. b. Co. Lit. 337. a.

the Survivor enter, becauſe he ſhall not take Benefit of the Infancy of his Companion, but that the Survivor ſhall be driven to his Writ of Right, which without Doubt he may have, becauſe after the Feoffment the Joint-tenants might have joined in it. And if the Huſband within Age makes a Feoffment in Fee and dies, the Heir of the Huſband cannot enter to avoid this Feoffment, becauſe nothing deſcended to him from the Huſband; for the Law doth not reſpect what Eſtate the Anceſtor gives, but what Eſtate he had before the Gift, and what Right or Title the Anceſtor leaves to deſcend to his Heir: and therefore if an Infant be Tenant in Tail, and makes a Feoffment in Fee, and dies without Iſſue; his (*a*) collateral Heir cannot enter to avoid this Feoffment; for altho' by his Feoffment he gave Fee-ſimple, yet when he died without Iſſue, nothing deſcended to the Heir, in reſpect of which he could enter: So if Lands be given to one and the Heirs Females of his Body, and he has Iſſue a Son, and makes a Feoffment in Fee, and dies within Age without Iſſue Female, the Son ſhall not enter in this Caſe for the ſaid Infancy, becauſe no Right deſcended to him. So if an Infant be Tenant *pur* (*b*) *auter vie*, and make a Feoffment in Fee, and *Ceſtuy que vie* dies, the Infant or his Heir ſhall never enter upon the Feoffee, but he in Reverſion or Remainder: But foraſmuch as the Infant himſelf, during his Life, might have entred upon the Feoffee in the Right of his Wife only, and not in reſpect of any Right which he himſelf had, it ſeems reaſonable with *Littleton*, *fol.* 43. That the Wife in the ſaid Caſe, when the (*c*) Huſband within Age makes a Feoffment in Fee, may enter in her own Right, in which Right her Huſband might have entred; and *eo potius*, becauſe the Huſband's Heir cannot enter: But if the Huſband within Age takes a Wife Tenant in General Tail, and makes a Gift in Tail to another, by which he gains a new Reverſion in Fee, there the Entry is given to the Wife for the Cauſe aforeſaid, *i. e.* that the Huſband might have entred in her (*d*) Right; alſo the Heir of the Huſband who has the new Reverſion deſcended to him, may alſo enter; but if he enters, and defeats the Eſtate Tail given by the Infant, preſently the new Reverſion by Act in Law vaniſhes from the one, and veſts in the other, (*e*) and the Wife by Operation in Law ſhall be preſently ſeiſed of her ancient Eſtate: for when the Eſtate tail is defeated, which was the Cauſe of gaining the new Reverſion, the Heir cannot have the Eſtate which his Anceſtor had before the Gift; for his Anceſt. before the Gift had nothing, but in the Right of his Wife, which determined by his Death, as it is held in * 4 *H.* 6. 2. where the Caſe was, That a Man ſeiſed of certain Lands in the (*f*) Right of his Wife, made a Feoffment thereof by Deed indent. to certain Perſons, upon Condition that

(*a*) 1 Rol. 676, 677.

(*b*) Co. Lit. 336. b

(*c*) Lit. §. 633. Co. Lit. 336. b. 337. a. Lit. 142. a. Palm. 254.

(*d*) Co. Lit. 336. b 337. a.

(*e*) Co. Lit. 336. b 202. a.

* 4 H. 6. 2. a. b. Fitz. Entre congeable 1. Br. Entre congeable 38. Br. Condit. 71. Br. Diſcontinuance 8.

(*f*) Co. Lit. 202. a

that they ſhould leaſe the Lands again to the Huſband and Wife for their Lives, with divers Remainders over in Tail, the Remainder to the Right Heirs of the Huſband, and afterwards the Huſband died, the Feoffees leaſed the Land to the Wife for Life, with Remainders over in Tail, the Remainder to the right Heirs of the Wife, where it ſhould be to the right Heirs of the Huſband: And in that Caſe it is reſolv'd, That for the Condition broken, the (*a*) Huſband's Heir might enter; for altho' no Right deſcended to him from the Huſband, whoſe Eſtate determined by his Death, yet the Title of Condition, which he himſelf created on his Feoffment, and reſerved to him and his Heirs, ſhould deſcend after his Death to his Heir; and ſo a Difference between a Title of Entry by Reaſon of a Condition, and a Right of Entry by Reaſon of Infancy; for none ſhall take Benefit of the Infancy of his Anceſtor, but he who has a Right deſcended to him from the ſame Anceſtor; but the Heir may take Benefit of a Condition, altho' no Right deſcends to him from the ſame Anceſtor. Three other Points are in a Manner reſolv'd in the ſaid Caſe of (*b*) 4 *H.* 6. 1. That when the Huſband's Heir enters for the Condition broken, thereby the Feoffment which made the (*c*) Diſcontinuance is defeated, and by Conſequence, the Diſcontinuance itſelf is defeated: 2. That after the Heir of the Huſband hath entred for the Condition broken, the Eſtate of the Heir vaniſhes, and the Eſtate is (*d*) immediately reveſted in the Wife, without Entry or Claim made by her; for the Heir enters by Force of the Condition, and not in Reſpect of any Right, and there two Caſes are put to prove it: 1. If Tenant for Life makes a Feoffment in Fee upon Condition, who enters for the Condition broken, now the Feoffment is avoided, and by Conſequence the Reverſion preſently by the Entry reveſted. 2. If the Huſband himſelf had entred for the Condition broken, it had reveſted the Eſtate in the Wife. The third Point obſervable in the ſaid Caſe of (*e*) 4 *H.* 6. is, That altho' the Wife had accepted an Eſtate for Life, and ſo concluded herſelf by Acceptance to have any *Cui in vita*, yet when the Eſtate which ſhe had taken is defeated by the Condition, the Concluſion by the Acceptance is alſo avoided. *Vide Littleton, cap. Diſcontinuance* 43. Privies (*f*) in Law, as Lord by Eſcheat, *&c.* ſhall never take Benefit of the Privity of Infancy, becauſe he is a Stranger to him; and when the Infant dies without Heir, the Feoffment is unavoidable. The ſame Law of (*g*) Coverture, and *Non ſanæ memoriæ*, and ſo you will better underſtand your Books in 14 *Ed.* 3. *Dum fuit infra ætatem* 6. *F. N. B.* 192. 21 *E.* 3. 50. *Dum fuit infra ætatem* 2. 18 *E.* 2. (*h*) *Brev.* 831. 30 *E.* 3. 29. 45 *Edw.* 3.

(*a*) Co. Lit. 330. b. 2 2. a. Fitz. Entry congeable 1. Br. Entry congeab. 38. Br. Condit. 71. Br. Diſcontinuance 8.

(*b*) 4 H. 6. 2 b. 3. a. b.

(*c*) Br. Diſcontinuance 8.

(*d*) Co. Lit. 202. a. 336. b.

(*e*) 4 H. 6. 2. b. 3. a. b.

(*f*) Palm. 254. 7 Co. 7. b. 4 Co. 124. a. 1 Rolls Rep. 401. 442. 22 H. 6. 27. a. Br. Entry congeable 129. Palm. 234. 3 Bulſtr. 272. 2 Inſt. 483.

(*g*) 1 Roll. Rep. 401. 3 Bulſt. 272.

(*h*) Palm. 254.

49 *Edw.* 3. 13. 39 *H.* 6. 42. 34 *H.* 6. 31. 6 *H.* 4. 3. 9 *H.* 6. 6. 7 *H.* 4. 5. 2 *H.* 4. 13. 32 *H.* 6. 27. *The Abridgment of the Book of Assises*, 87. *b.* 7 *H.* 5. 9.

(*a*) 3 Bulst. 59. It was also resolv'd, That if the Estate of the (*a*) Infant had been upon Condition to be performed by the Infant, and the Condition had been broken during his Minority, that the Land had been lost for ever. Note, Reader, As to that, it is to be known, that there are (*b*) two Manner of Conditions, *scil.* a Condition in Fact, that is, expressed, as to pay Money, or to do, or not to do some other Act, *&c.* and Condition in Law, that is, implied: Also Conditions in Law are of two Natures, *scil.* (*c*) by the Common Law and by the Statute: And Conditions in Law by the Common Law are in two Sorts, one which is founded upon a Confidence and Skill, and the other without Confidence or Skill; Conditions in Law by Statute Law are also of two Qualities, *scil.* When the Statute for Execution of the Condition in Law gives Recovery, and when the Statute gives an Entry and no Recovery; as to the Condition in Law, which is founded upon (*d*) Skill and Confidence, as the Offices of Parkership, Stewardship, *&c.* in Fee, which descend to an Infant, or a Feme-Covert, if the Condition in Law annexed to the said Offices be broken, it shall bar the Infant and Feme-Covert for ever; the same Law of Liberties and Franchises: But if the Infant or Feme-Covert be Lessee (*e*) for Life, or Tenant by the Curtesy, or Tenant in Dower, and the Infant, or the Husband of the Wife makes a Feoffment in Fee, and the Lessor enters for the Forfeiture, as he may, yet it shall not bar the Infant or Feme-Covert, but that the Infant or Feme-Covert, after the Death of the Husband, may enter, for that is by Force of a mere Condition in Law, without any Skill and Confidence annexed to the Estate. If an Infant, or a Feme-Covert, Lessee for Life commits wast, and the Lessor recovers in an Action of (*f*) Wast, it shall bind the Infant and Feme-Covert; For the Statute gives the Action to recover the Land. The same Law of (*g*) *Cessavit*, and of other like Cases: As if an Infant be Gaoler, and suffers an Escape, there an Action lies. But if the Condition in Law be by Force of a Stat. Law, which gives an Entry, and no Action, as (*h*) if an Infant, or the Husb. seised in the Right of his Wife, aliens in Mortmain there, altho' the Lord, of whom the Land is held, enters; yet the Right of the Infant or Feme-Covert is not barred, no more than in the Case of a Condit. in Law by the Com. Law which is grounded upon the Alienation of the Infant Tenant for Life, or of the Husb. *&c.* where Entry to the Lessor is given by the Com. Law. And so you will better understand your Books in 31 *Ass. pl.* 17. *Br. Covert.* 71. *Plow. Com. Stowell's Case* 355. *Doctor and Student, lib.* 2. *fol.* 113. *Vide* 12 *Edw.* 3. *Age* 54. 14 *Edw.* 3. 88. 28 *Edw.* 3. 99. 2 *Edw.* *Age* 132. 9 *Edw.* 3.

(*b*) Hard. 11. 1 Rolls Rep. 198.

(*c*) Hard. 11. Co. Lit. 233. b.

(*d*) Co. Lit. 233. b. Hard. 11. Cr. Car. 556.

(*e*) 1 Rol. 851. Co. Lit. 233. b. Godb. 345. 365.

(*f*) Plowd. 364. b. Co. Lit. 233. b. Co. Lit. 54. a. F. N. B. 59. l.

(*g*) Plowd. 364. b. 2 Inst. 401.

(*h*) 2 Inst. 382. Cot Lit. 233. b.

Not

Note Reader, That a Condition in Law by force (*a*) of a Statute which gives a Recovery, is ſtronger than a Condition in Law without a Recovery; for (*b*) if Leſſee for Life make a Leaſe for Years, and afterwards enters into the Land and commits Waſt, and the Leſſor recovers in an Action of Waſt againſt the Leſſee for Life, he ſhall avoid the Leaſe for Years, made before the Waſt committed: (*c*) But if Leſſee for Life makes a Leaſe for Years, and afterwards enters and makes a Feoffment in Fee, the Leſſor ſhall not avoid the Leaſe for Years. So if the Tenant makes a Leaſe for Years, and afterwards is attainted of Felony, or dies without Heir, the Lord by Eſcheat, altho' he recovers by Writ of Eſcheat, ſhall not avoid the Term. But afterwards it appeared in the principal Caſe, that the ſaid ſuppoſed Feoffment of the ſaid *Prudence* was executed by Letter (*d*) of Attorney made by the ſaid *Prudence*; wherefore it was reſolved, That it was void, and that the Land did eſcheat to the Queen.

(*a*) Co. Lit. 233. b.

(*b*) Co. Lit. 233. b.

(*c*) Co. Lit. 333. b.

(*d*) Ant. 42. b. 2 Inſt. 483. 9 Co. 76. b.

Mich.

Mich. 6 Jacobi.

In the Common Pleas.

JEHU WEBB's *Case.*

JEHU *Webb* brought an Aſſiſe againſt Sir *Thomas Knyvet*, Knight, Lord *Knyvet*, *John Freeburne*, and *Roger Rolles*, *de libero tenemento ſuo* in *Weſtminſter*, and made his Plaint, *de Officio Magiſtr. ludorum pilarum palmarium* (*Anglice*, the Office of the Maſter of the Tennis Plays) *Domini Regis nunc* in *Weſtminſter*; and for his Title ſaid, *Quod Officium prædꝰ eſt antiquum Officium in Weſtmꝰ prædꝰ, quodq; Dominus Rex nunc* 27. *Nov. Anno* 5. by his Letters Patents, &c. *ex certa ſcientia & mero motu dedit & conceſſit eidem Jehu prædꝰ Officium Magiſtꝰ Ludorum pilarum palmarium tam infra palatium de Weſtꝰ prædꝰ, quam alibi dicti Domꝰ Regis nunc Angliæ, habendꝰ & gaudendꝰ prædꝰ Officium eidem Jehu*, &c. *durante Tempore vitæ ipſius Jehu* &c. by Force whereof the ſaid *Jehu* was ſeiſed of the ſaid Office, with the Appurtenances, for his Life, and that he took and received the Profits thereof to his own Uſe, until the Defendants wrongfully, and without Judgment, diſſeiſed him, &c. and the Defendants pleaded, No Wrong, No Diſſeiſin. And upon the Evidence to the Recognitors of the Aſſiſe in this Term, it was held *per totam Curiam*, That where the Grant was in *Engliſh*, *Of the Office of the King's Tennis Plays in Weſtminſter*, &c. that this Grant ſhould be taken in a reaſonable Senſe; that is to ſay, The Tennis Plays for the King's Houſhold, and not only for the Tennis Play when the King himſelf Plays in his Royal Perſon; for the King is the Head of his Houſhold, and theref. *a digniori parte*, the Tennis Plays for his Houſhold may be well called *The K's Tennis Plays:* So where a Commiſſion is made to take Boys ſinging in Cathedr. Churches &c. or other Places where Children are taught to ſing, to furniſh the K's Chapel, theſe general Words

Words by Construction of Law, have a reasonable Intendment; *scil.* that such Boys as are brought up and taught to sing, to seek and get their Living by it, may be taken for the K's Service, and it will be a good Preferment for them to serve the K. in his Chappel; but the Son of a Gentleman, or any other, who is taught to sing for his Ornament, Delight, or Recreation, and not thereby to get his Living, cannot be taken against his Will, or the Consent of his Parents or Friends; and so it was resolved by the two Chief Justices, and the whole Court of Star-Chamber, *Anno* 43 *Eliz.* in the Case of one *Evans*, who had by Colour of such Let. Patents taken the Son of *Clifton* (a Gentlem. of Qual. of *Norfolk*) who was taught to sing for his Recreation; which *Evans* for the said Offence was grievously punished. And in the Case at Bar divers Questions were moved, in what Cases an (a) Assize lay by the Common Law, and in what by the Statute of *Westm.* 2. *c.* (b) 25. It is to be observed, That at the Com. Law there was but two Forms of Writs of Assize of *Novel Disseisin*, *scil.* *Assize de libero tenemento*, and *Assize de Communia Pasturæ* for his Cattle, *&c.* which was so (d) necessary, that without it his Freehold could not be manured, and theref. it appears in 35 *Ass. p.* 11. 4 *Edw.* 2. *Ass.* 451. 11 *Hen.* 6. 22. *a.* and other Books, that *Assise de libero tenemento* lay of Land, Rent, and all other Things whereof a (e) *Præcipe quod reddat* lay at the Common Law. But of (f) Profits apprender in *certo loco*, the Statute of *Westm.* 2. *Cap.* 25. gave an Assise of *Novel Disseisin*, in lieu of a *Quod permittat*, which was the Remedy for them at the Common Law, before the said Statute, as is to be seen in 4 *E.* 3. *Ass.* 449. 8 *E.* 2. *Ass.* 385. 16 *E.* 2. *Ass.* 370. 31 *E.* 1. *Ass.* 440. &c. And in some Case, the Statute gives an Assise in Case where there was not any clear and certain Remedy at the Common Law; for if one had not such Profits apprender but for Term of his Life, it was held that he should not have a *Quod permittat* for them, because such Writ was in the Nature of a Writ of Right, as appears in 30 *E.* 1. *Quod permittat* 9. where in a *Quod permittat* Battle was waged. *Vide* 4 *E.* 3. 38. 32 *Edw.* 1. *Juris utrum*, 14. *F. N. B.* 124. *B. C.* And therefore the Statute saith, *Quod breve Assisæ novæ Disseisinæ locum habeat* (g) *in plurib' Casib' quam prius habuit:* And first the Statute begins, *Cum proficuum capiendis, colligendis, aut recipiendis in alieno solo, &c.* as in *Boscis, Scil't de Estoveriis bosci, & proficuo capiend' in Bosco.* 2. *De* (h) *nucib' & Glandib' & aliis fructib' in alieno Solo colligendis*, which are Examples of Profits to be taken in Woods. 3. *De* (i) *Corrodio*, and of the Parts thereof, *quæ pertinent ad Victum & Vestitum, Scil't Liberatione*

(a) Co. Lit. 159. 2.
(b) 2 Inst. 409, 410, 411, 412, &c.
(c) 2 Inst. 411.
(d) 2 Inst. 411.
(e) 2 Inst. 411.
(f) 2 Inst. 411.
(g) 2 Inst. 411.
(h) 2 Inst. 411. F. N. B. 78. f.
(i) 2 Inst. 411.

ratione bladi ac aliorum Victualium ac neceſſariorum, as Apparel, Lodging, Waſhing, *&c. in certo loco annuatim recipiend'*, which is well explain'd by this Word *recipiend'*, for a Corody is properly to be received, and Eſtovers, and the other Profits to be taken, *ſcil. capiend' & colligend'*. So the firſt Profits are, *proficua capiend' ſeu colligend'*, and the Corody, *&c.* is *proficuum recipiend'*.

(a) 2 Inſt. 58. 219. 412. Davis 13. a. 12 Co 33. F. N. B. 178. G.
(b) Moor 46.

4. *De* (a) *Tolneto*, (*& ut Specieb' ejuſdem*) *Tronagio*, *Paſſagio*, *Pontagio*, (b) *Pannagio & hiis Simil' in certis Locis capiendis. Tolnetum*, i. e. *Theolonium*, i. e. Τιλ&. *Grace*, *& Latine Vectigal*, *quod dicitur a vehendo*, *quia præſtatur de rebus quæ vehuntur*, *a vehendis mercibus ſic dictum*, *unde dicuntur Vectores qui vehunt*, & *Bracton*, *lib.* 2. *cap.* 24. *numero* 3. *Si cui concedatur talis libertas*, &c. *quod Theolonium & Conſuetudines capiat*, (which is the Word that the Statute uſes, *ſcil. Capiendis*) *infra libertatem ſuam de ementibus & vendentibus*, &c. Vide *Fleta*, *lib.* 1. *cap.* 47. *& Nota*, *Bracton* wrote in the End of *Henry* the Third, Father of King *Edward* 1. and *Fleta* wrote in the Reign of King *Edw.* 1. who made the ſaid Act. And in the Goſpel of St. *Matthew*, *cap.* 9. *ver.* 9. *Jeſus tranſiens vidit hominem ſedentem ad telonium:* Mar. 2. 14. Luc. 5. 27. *Vide* 13 *Edw.* 1. *Aſſiſe* 401. No Aſſiſe lies of Suit to a Mill, but a Writ *de Secta ad Molendinum*, but of the Toll of a Market an Aſſiſe lies; and ſo of the Toll of a Mill. *Vide* 23 *H.* 3. 435. *tit. Aſſiſe* 427. *acc.* So of Toll thorough, Toll traverſe, and Toll turn, and all theſe a Man ſhall have in his own Land; and yet he being diſſeiſed of them, ſhall have an Aſſiſe of them. *Tronagium eſt ſpecies Tolneti & dicitur a Trona*, which ſignifies a Beam with which Things are to be weighed, *& proprie tronagium exigi debet de ponderatione lanarum*, *& peſagium exigi debet de mercibus*, as appears by a Record in the Treaſury, *Hill.* 5 *E.* 3. *Lincoln' numer'* 32. but the one is often taken for the other. And it appears by *Fleta*, *lib.* 2. *cap.* 12. which was written in the Time of *E.* 1. in which Time the Statute was made, that *Trona* ſignifies a Beam. *Paſſagium*, that is properly a Ferry for the Paſſage of Men and Cattel over a Water, for which the Owner has a Toll; for if a Man has Paſſage in the Barge or Veſſel of another to the Church, or elſewhere, it is not any Profit, but an Eaſement, whereof no Aſſiſe lies, as it is adjudged in 31 *E.* 3. *Aſſ.* 44. and 19 *E.* 2. *Aſſ.* 399. and 34 *Aſſ. p.* 13. an *Aſſiſe de novel diſſeiſin* doth not lie of a (c) Way, becauſe it is but an Eaſement, and no Profit to be taken, *nullum proficuum recipiend'*, as the Stat. ſpeaketh. (d) *Pontagium*, *Pontage* is a Toll for Paſſage or Car. over a Bridge, and thereupon it is called *Pontage*, as appears 3 *E.* 3. *Aſſ.* 445. and *F. N. B.* 227. and *Regiſter* 259. *Rex Collectoribus*, &c. *Pontag' in villa de S.* &c.

(c) Br. Aſſiſe 337. Br. Chimini 8. Br. Pleint in Aſ. 31. Fitz. Aſſiſe 317.
(d) Davis 13. a. b.

Pannagium,

(a) *Pannagium* is a Toll for the Paving of a City, or a Cawsey, or a Way, as appears in 3 *Ed.* 3. *Assise* 445. *F. N. B.* 227. *Reg.* 259. and in old Times it was written *pavagium*, or *pauvagium*, or *paviagium*, and by Corruption, *pannagium*, sc. *nn*, for *m*, &c. The Statute goes farther, *& his similibus*, as for (b) *Murage*, sc. Toll for making of a Wall for Safeguard of Men in Time of War or Tumult, as appears in the said Books of 3 *E.* 3. and *F. N. B.* 227. *Register* 259. (c) *Cranage* is a Toll for drawing of Merchandizes out of Vessels to the Wharf, *&c.* and so called, because the Instrument is in the Form of a Crane. Vide *Dyer* 18 *Eliz.* 352. and the Book of Entries 3. So of *Stallage*, (d) *Picage*, *Wharfage*, *Anchorage*, *Pedagium*, *a pede dictum*, *quod a transeuntibus solvitur*.

(a) Dav. 13. a.
(b) Dav. 13. a. b.
(c) Dyer 352. pl. 27.
(d) Dav. 13. b.

5. *De* (e) *Officiis*, *Scil't Custodiis Boscorum*, *Parcorum*, *Forestarum*, *Chacearum*, *Warrennarum*, *Portarum*, *& aliis Ballivis & Officiis in feodo*, *jacet de cætero Assisa novæ Disseisinæ*; which Words (*de cætero*) have perswaded divers, that an Assise of an Office did not lie at the Common Law, and so are some Opinions in 16 *E.* 2. *Ass.* 370, and that no Assise by the Statute lay of any Office, but of an Office in (f) Fee, because the Assise came in lieu of a *Quod permittat*, which none could have at the Time of making the Act, as hath been said, but Tenant in Fee. *Vide* 4 *E.* 2. *Assise* 449. and 8 *E.* 2. *ibid.* 385. But it appears by our Books, that an Assise lay of an Office *ut de* (g) *libero tenemento*, at the Common Law, for of all that a *Præcipe quod reddat* lay at the Common Law, an Assise lay. 7 *E.* 3. 63. *b.* in *Henry de Parker*'s Case, a Writ of Entry in the *Per* and *Cui*, *de Balliva custodiendi parcum de Clarkell cum pertinentiis*; and 8 *E.* 3. 55. *b.* 56. *a.* the Bishop of *Salisbury*'s Case, a Writ of *Aiel de Bedelria Hundredi de Cademinster*, *& nota* there *Dictum Stoufe*, 10 *E.* 3. 27. *b. acc.* and 19 *Ed.* 3. *View* 77. *Ad terminum qui præteriit* brought *de Bedelria de Soke* of *Winchester*; and Exception was taken, That it was a Profit issuing out of no Freehold, *& non allocatur*. (h) 18 *Edw.* 3. 27. *a.* A Formedon of the Office of Serjeanty in the Cathedral Church of *Nichol'*. *Vide* (i) 27 *H.* 8. 12. *a.* 7 *H.* 6. 8. *b.* 7 (k) *Ass. p.* 12. 10 (l) *Ass. p.* 11. The Statute saith, *Office in Fee*; yet an *Assise* lies of an Office, although the Disseisee has but an Estate for (m) Life; for the Statute was made as to that in Affirmance of the Common Law, as in 30 *Ass. p.* 4. *Officium* (n) *Messoris*; 22 *H.* 6. 9. *b.* the Office of (o) Packing of Cloths, *&c.* and if the Office of Sheriff is granted for Life, an Assise lies of it, 9 *E.* 4. 6. *a. b.* the Office of one of the (p) Clerks of the Crown in the Chancery, 18 *Edw.* 2. *Assise* 377. *Assise* of the Office of the Bedell of the Hundred of *Westm'* and *Midd'*, and 4 *Edw.* 2. *Assise* 449. and *ibid.* 8 *E.* 2. 385.

(e) F. N. B. 178. F. Postea 55. a. 2 Inst. 412.
(f) 2 Inst. 412.
(g) F. N. B. 178. F. 2 Inst. 412.
(h) Co. Lit. 20. a. 1 Roll. 838.
7 Co. 33. b. Nevil's Case.
(i) Postea 47. b. 49 b. Br. Præcipe quod reddat 1.
(k) Br. Assise 121. Br. Plaint, &c. 9.
(l) Br. Præcipe quod reddat 19.
(m) 2 Inst. 412.
(n) Fitz. Assise 296. Br. Assise 307. Br. Plaint, &c. 16.
(o) Fitz. Assise 10. Br. Assise 76.
(p) Br. Assise 95. Fitz. Assise 29.

385. The Archbiſhop of *Canterbury*, by Deed *dedit Johanni porteriam Curiæ ſuæ Cantuarienſis*, which Grant was but for Life, and yet an Aſſiſe lay. 8 *Edw.* 4. 16. *b.* an Aſſiſe of an Office (*a*) in the Common Pleas, 28 *H.* 8. *Dyer* 7. and 3 *Ma. Dyer* 114. an Aſſiſe lies of the Office of a (*b*) Philizer in the Com. Pleas, and the Poſt where he ſits ſhall be put in View, 5 *Ma. Dyer* 153. Aſſiſe lies of the Office of the (*c*) Regiſter of the Admiralty, which the Plaintiff had for Life. Note, Although the Proceedings in that Court be according to the Civil Law, yet the Offices are determinable by the Common Law: So of a Regiſter of the Conſiſtory of a Biſhop, 31 *H.* 8. *Br. Grants* 134. Aſſiſe lieth of the Office of Steward, Bailiff, or Receiver of a Mannor; and all this is meant of Offices of (*d*) Profit, and not of an Office of Charge and no Profit, as it is held in 27 *H.* 8. 12. and 31 *E.* 1. *Aſſiſe* 440. *Vide* 21 *E.* 3. 4. *b.* And where ſome ſay in the Time of *E.* 2. as is aforeſ. that an Aſſiſe was given by the ſaid Stat. in lieu of a *Quod permittat*, there is (*e*) no Writ in the *Regiſter* of a *Quod permittat* of an Office; and yet I have a *Regiſter* of *H.* 2's Time, which was long before the ſaid Act; and I conceive, that no Writ of *Quod permittat* lay of an Office, becauſe a *Præcipe quod reddat* lay of it, as before is ſaid; and therefore a Man ſhall have an Aſſiſe of an Office *ut de libero tenemento*, at the Common Law. And the Statute, as to Offices, was but a Declaration of the Common Law, as hath been ſaid, and to remove a Doubt which then was. And ſo the ſaid Words (*jacet de cætero, &c.*) are to be intended, that *jacet de cætero abſque difficultate*. And it appears by the principal Caſe at Bar, and by the ſaid Books of Offices in the Chancery, King's Bench, and Common Pleas, that although the Courts are removable in which the Offices are, yet if they be in a certain Place at the Time of the Diſſeiſin, it ſufficeth: For the Words *de proficuo in certo loco capiend'*, extend to Eſtovers, &c. and not to the Clauſe of Offices. *Vide* 4 *E.* 4. 2. And the Statute ſaith, *in omnib' Supradictis Caſib' modo conſueto fiat Breve de libero tenemento*: So that now of all Profits appren- der *in certo* (*f*) *loco*, the Writ ſhall be *de libero tenemento*: And the old Writ is given in a new Caſe; and theref. in 11 *Aſſ. p.* 13. the Writ was general *de libero tenemento*, and the Plaint *de quatuor acris ſaliceti*; that is, four Acres of (*g*) ſawcy, and to have reaſonable Eſtovers in 100 Acres of Wood, *ſcil.* Houſebote and Haybote, and the Plaint was challenged, 1. Becauſe the Plaint ought not to be *de quatuor acris ſaliceti*, but *terræ* or *prati*. 2. Becauſe the Plaintiff had joined in one Plaint two Freeholds, one *ſcil.* the four Acres of ſawcey at the Common Law, and the other, *ſcil.* the Eſtovers

(*a*) Fitz. Aſſiſe 28.
(*b*) Dyer 7. pl. 10. 114. pl. 63. Godb. 48. Dyer 152. pl. 9. 2 Brownl. 12.
(*c*) 2 Inſt. 412.
(*d*) 2 Inſt. 412.
(*e*) 2 Inſt. 412.
(*f*) 2 Inſt. 411. Moor 46.
(*g*) Fitz. pleint. 14. Br. Aſſiſe 107. Br. Plaint, &c. 29.

Estovers by the Statute, *scil.* the Statute of *West.* 2. (*a*) *cap.* 25. *& non allocatur.* And there it is said, *Quod isto Termin'* a Plaint of two Rents Services was adjudged good, for *liberum tenement'*, although it be in the singular Number, yet is *nomen collectivum.* *Vide* (*b*) 7 *Ass.* 18. and the Stat. farther saith, *& sicut prius jacuit, & locum habuit in Com' Pasturæ, ita de cætero locum habeat in Com' Turbariæ, Piscariæ, & aliis Com' hiis Similib', quas quis habet pertin' ad liberum Tenemen', vel etiam sine Tenemento per Speciale factum ad minus ad Terminum vitæ.* And the Reason wherefore an Assise lay at the Com. Law, of Common of Pasture, and not of other Commons, was, because there was a special Writ in the *Register* for Common of Pasture, and not for any other Common; and *in dieb' illis* they held themselves (*c*) strictly to the Form and Order of the *Register*, which is mention'd in the Stat. of *West.* 2. made 13 *E.* 1. *c.* (*d*) 24. *Vide temp' R.* 2. *Grants* 104. A Man shall not have a Writ of Assise, *quod disseisivit eum de libero estoverio*, and yet *Bracton* held, *l.* 4. *f.* 231. *quod* (*e*) *locum habet Assisa de qualibet communia pertin' ad liberum tenementum*, sc. *Communia pasturæ, turbariæ*, &c. and 12 *H.* 3. *Assise* 417. That an Assise lay of Common of * Piscary, *&c.* And these Opinions had great Probability of Reason, but because there wanted a Writ for them in the *Register*, for that Cause before this Statute an Assise did not lie of them, but a *Quod permittat*; and it appears by *Bracton*, *lib.* 5. *Tract' de Exceptionibus*, *cap.* 17. *fol.* 413. who wrote a little before the making of the said Act, That Original Writs cannot be (*f*) changed, but by Act of Parliament. For there he divides Writs into three Branches. *Sunt quædam Brevia formata* (id est *originalia*) *seu de cursu*; (which as appears there, were first formed and made by Authority of Parliament:) *Quædam judicialia ex eis* (id est, *ex originalibus*) *sequentia*, &c. *Quædam magistralia*, (*quæ nec sunt de cursu, nec formata*, id est, *de aliqua certa forma*) *& sæpius variant, secundum varietatem casuum factorum & querelarum:* (as are Actions on the Case, Actions of Deceit, Prohibitions, *&c.* which have not any certain Form, *&c.*) And of Writs or Originals formed or of Course, *Bracton* wrote divers remarkable Things, (*g*) *Breve quidem cum sit formatum ad similitudinem regulæ juris, quia breviter & paucis verbis intentionem proferentis exponit & explanat, sicut regula juris rem quæ est breviter enarrat*, &c. *Sunt* (*h*) *quædam brevia formata sub certis Casibus de cursu, & de Communi Consilio totius regni concessa & approbata, quæ quidem nullatenus mutari poterint absque consensu & voluntate eorum.* By which it appears, That Writs formed, and of Course, that is, Originals, were at first authorised by Parliament, and without Parliam. cannot be alter'd or (*i*) chang'd, and therewith agree our Books, for inasmuch as the Original Writ of *Assisa ultimæ præsentationis*

(*a*) 2 Inst. 409, 410, &c.

(*b*) Br. Assise 126. Br. Plaint, &c. 10.

(*c*) 2 Inst. 405.

(*d*) 2 Inst. 405, 406, &c.

(*e*) 2 Inst. 412.

* 2 Inst. 412.

(*f*) 2 Inst. 407. Co. Lit. 73. b.

(*g*) Co. Lit. 73. b.

(*h*) Co. Lit. 73. b.

(*i*) 2 Inst. 407. Co. Lit. 73. b.

præsentationis was formed in these Words, *Quis advocatus tempore pacis præsentavit ultimam personam quæ mortua est*, this Form shall hold, and cannot be changed, although the Incumbent resigns, as appears in 18 *E.* 2. *Assise de Darrien presentment*, 20. *&c.* and *F. N. B.* 31 *H.* Also the Writ of *Warrantia Chartæ* is framed in these Words, *Quod juste*, &c. *Warrantizet B. unum messuagium in D.* &c. *unde chartam habet*, &c. And yet if he be bound to Warranty by Force of an Exchange, or by *(a)* Homage ancestrel, the Form of the Writ shall not be alt. 9 *E.* 4. 49. *b.* 21 *(b) H.* 6. 8. *a. &c. Fitz. Nat. Br.* 134. and many other Cases may be put upon the same Ground. Also *Bracton* further saith, *Communia Brevia inter omnes pro jure generaliter observari debent cum sunt originalia, & actionibus originem præstent*: And therewith agrees *Fitzherbert* in his Preface to his *Nat. Brevium*: "In every Art and Science there "are certain Rules and Fundamentals, to which a Man "ought to give Credit and Belief, and which he cannot de- "ny: In like manner, there are divers Rules and Funda- "mentals in the Knowledge of the Common Law of the "Land, to which a Man ought to give Credit and Belief, "and not deny them, which are very necessary for those who "will understand the said Law, especially at the Beginning, "for upon those *(c)* Foundations the whole Law depends; "for which Cause in Times past, a very profitable Book was "composed, called the *Register*, which contains divers Prin- "ciples, by which he shall be well instructed who would un- "derstand the said Laws:

(a) Dyer 8. pl. 26. 7 H. 7. 2. a. Br. General brief, &c. 13 in medio. Br. General brief, &c. 8. 24 E. 3. 35. b. F. N. B. 134. f. 2 And. 96.

(b) Br. Warrantia Chartæ 18.

(c) Co. Lit. 73. b. 3 Co. 38. a.

And that was the Reason, that forasmuch as there was no Original Writ formed of *Assise* of *Novel Disseisin*, of Common of Turbary, Piscary, *&c.* but only of Common of Pasture, for that Reason no *Assise* of *Novel Disseisin* lay of them before the said Statute of 13 *E.* 1. And with *Bracton* agrees *Fleta*, which Book was wrote a little af. the said Act of 13 *E.* 1. *Dicuntur brevia cum sint formata ad similit' regulæ juris quæ brev' & paucis verbis intent' proferent' exponit & explan': sicut regula juris rem quæ est brev' enarrat*, &c. *Et sunt quædam Brevia formata sub certis Casibus, & quædam de cursu, quæ Consilio totius regni sunt approbata, quæ quidem mutari non poterint absque eorundem contraria voluntate. Sunt & Brevia ex eis sequentia, quæ dicuntur judicalia.* And whereas afterwards, at the same Parliament of *Westm.* 2. 13 *E.* 1. (d) *cap.* 24. it is enacted, *(e) quotiescunque de cætero evenerit in Cancellaria quod in uno casu reperitur Bre', & in consimili casu cadente sub eodem jure & simili indigente remedio non reperitur, Concordent Clerici de Cancell' in Bre' faciendo, vel atterminent quærentes in proxim' Parliament', & scribantur Casus in quibus concordare non possunt.*

(a) 2 Inst. 405, 406, &c.

(c) 2 Inst. 407.

ſoſſunt, & referant eos ad proxim' Parliament' & de Conſenſu Juriſperitorum fiat Breve, ne contingat de cætero quod Curia Domini Regis deficiat Conquerentibus in Juſtitia perquirenda. And the Preamble of the ſaid 24th Chapter was conſonant to the Concluſion, *de cætero non (a) recedant querentes a Curia Regis ſine remedio.* By Force of which Act, the Writ called the Writ *de Ingreſſu in conſimili caſu*, was formed by the Clerks of the Chancery, as it is adjudged in 3 *E.* 2. *Entry* 8. which was given in the ſame Age that the ſaid Act was made, and *F. N. B.* 206. *f. Vide* 38 *E.* 3. 13. Note, Reader, at the Time of the making of the ſaid Act, as it appears in *Fleta*, *lib.* 2. *cap.* 13. The Clerks of the Chancery (which are meant in the ſaid Act) were grave, wiſe, and circumſpect Men, ſworn to the King, and of profound Knowledge in the Laws and Cuſtoms of *England*; for the Words of the Book are, *Eſt inter cætera quoddam Officium quod dicitur Cancellaria, quod viro provido & diſcreto, &c. magnæ dignitatis debet committi, &c. cui aſſocientur Clerici honeſti & circumſpecti, Domino Regi jurati, qui in Legibus & Conſuetudinibus Anglicanis notitiam habeant pleniorem, &c.* And the Writs which they form, are called *(b) Brevia Magiſtralia*, becauſe theſe Clerks, for their Knowledge, were called *Magiſtri Cancellariæ*, as thoſe who wrote *Brevia de Curſu* were, and yet are called *Curſitorii*. And as the Writs which the Curſitors write are called *Brevia de Curſu*, ſo the Writs which the Maſters draw in difficult Caſes, are called *Brevia Magiſtralia*. But when ſuch Clerks, ſo knowing of the Law, failed, then the Judges in many Caſes, gave Allowance to ancient Forms of Writs, and drove the Party to make a *(c)* ſpecial Count when the Writ doth warrant the Count in Subſtance, although there be Variance in Circumſtance, as in the ſaid Caſes of *Darrien Preſentment*, and *(d) Warrantia Chartæ*, and many others, the Subſtance of the one is the Avoidance, and Death or Reſignation, but the Circumſtance; and in the other Warranty is the Subſtance, and the Manner of it but the Circumſtance. But when the Caſe will not bear it, (as in Aſſiſe *de Communiæ Paſturæ*, he cannot make his Plaint of common of Piſcary, Turbary, *&c.*) then *ultimum refugium* is to refer it *ad proximum Parliamentum*, as the Statute ſpeaks. *Nota*, Reader, in the ſaid Statute of *Weſtm.* 2. *cap.* 24. a little before it is ſaid, *Et in Regiſtro de Cancellaria non eſt inventum aliquod Breve in iſto caſu ſpeciali:* And therefore the Statute provides Remedy in it, by which appears alſo the Antiquity of the *(e)* Regiſter, which is as ancient as Original Writs, the Antiquity whereof ſee in the Preface to the Third Part of my Reports. And in the principal Caſe, Exception was taken to the Plaint, becauſe in his Title he ſaith,

(a) 2 Inſt. 406.

(b) 2 Inſt. 407.

(c) F. N. B. 33. b. c.

(d) 2 And. 96. F. N. B. 134. f. 24 E. 3. 35. b. Br. Gen. Brief, &c. 8. 7 H. 7. 2. a. 9 E. 4. 49. b. 21 H. 6. 8. a. Br. Gen. Brief, &c. 13. in Medio.

(e) Co. Lit. 16. b. 73. b. 159. a.

Quod Officium prædictum est antiquum Officium in Westm' prædict': quodque prædictus Dominus Rex nunc, &c. per Literas suas Patentes, &c. concessit eidem Jehu *Officium Magistri Ludorum pilarum palmarium, &c. Habend' idem Officium eidem* Jehu, *durante vita sua, &c.* And doth not shew that any Profit belongs to the said Office, and a Man shall not maintain an Assise of an Office without Profit, as the Book is in (a) 27 *H.* 8. But it was answered and resolved, That the Plaint was well enough: For true it is, that of an Office of Charge no Assise lies, as it is held in 30 *Ass. pl.* 4. 8 *E.* 4. 22. and 27 *H.* 8. 12. and 30 *Ass. pl.* 4. There Assise was brought of the Office of Reaper of the Mannor of *D. cum pertinen'*, and there *Shard* took a Difference between an ancient Office and a new Office; For in an Assise of a new Office first erected and appointed, there the Plaintiff ought to shew what Fee or Profit is granted for the exercising of it, for it cannot have a (c) Fee and Profit belonging to it, as an ancient Office may. And there *Burton* saith, that their Opinion was, That if a Man makes Plaint of the Office, and of the Profit, the Plaint had abated; for by the Recovery of the Office, the Fee and Profit, as Parcel of it, shall be recovered; and therewith agree the Book in 8 *E.* 4. 22. *b.* where in an Assise of an (d) Office in the Common Pleas, he made his Plaint of the Office and Fee, and Wages and Commodities; and *Choke* excepted against it, because he complained of one Thing twice, *scil.* of the Office and of the Fee: *Jenney*, who was of Counsel with the Plaintiff, we have amended our Plaint; For it is but of the Office, with the Appurtenances. *Pigot*, Then the Plaint is not good: For a Man shall not maintain an Assise of an Office without Profit: And the Court held the Plaint good as to that, and therewith agree 5 *Edw.* 4. 3. (e) 22 *H.* 6. 9. *b.* 9 *Edw.* 4. 6. *a. b.* And it is to be known, That if a Man be disseised of the whole Office, he shall have an Assise *de Officio cum Pertinentiis*; but if he be disseised of Parcel of the Profits, he may have an Assise of these Parcels only, 22 *H.* 6. 11. *b.* 13 *Edw.* 3. *Plaint* 23. If a Man gives me the Keeping of his Park, taking two Pence *per Diem*, and a Robe the Plaint shall not be of the Office or Keeping, if I be not disseised of the whole Office: But if I be disseised of the Robe or Fee, the Plaint shall be only thereof. And 3 *Edw.* 3. *Assise* 175. An *Assise* of *Novel Disseisin* was brought, and he made his Plaint of a Profit apprender for the Keeping of the Park and Wood of *Preston* every Day of the Year a Penny Half Penny for his Poultrey

(a) 27 H. 8. 12. a. Antea 47. a. Br. Præcipe quod reddat 1.

(b) Fitz. Assise 296. Antea 47. a. Br. Assize 307. Br. Pleint, &c. 16.

(c) Cr. Car. 50, 51.

(d) Fitz. Office del Court 6. Fitz Pleint 4. Br. Pleint, &c. 19.

(e) Antea 47, a. Fitz. Assise Br. Assise 76.

(f) Br. Assise 93. Fitz. Assise Antea 47. a.

and a Robe, and the Assise was maintained: And there *Scrope* held, That if I have a Corody to take four Loaves, and four Flagons of Ale in the Week, although they are but one Corody and one Freehold, yet if I be disseised only of the Bread, I shall not complain of both, *scil.* of the Ale and the Bread, but only of the Bread, otherwise my Plaint shall abate: But if I be disseised of two of the Loaves only, I shall make my Plaint of all the four Loaves, with which agree (*a*) 22 *H.* 6. 9. *b.* and 12 *Ass. pl.* 23. Assise was brought of Meat and Drink, as appurtenant to an Office. And in the principal Case at Bar, the Assise found for the Plaintiff against *Roger Rolls*, *in duobus Sphæristeriis*, *Anglice*, Tennis-Courts, *quorum unum vocatur*, the Close Tennis-Court, *& alterum vocatur*, the Brake in *Westm' præd'*, and assessed Damages and Costs, and acquitted the Lord *Knyvet* and *John Freeborn*, of the Disseisin of the Office aforesaid. *Ideo consideratum est quod prædictus* Jehu *recuperet seisinam suam versus præfatum* Rogerum *de Officio prædicto in prædictis duobus Sphæristeriis per visum recognitorum Assisæ prædictæ*, with Damages and Costs, *& prædictus* Rogerus *in misericordia*, *& prædictus* Jehu *in misericordia*, *pro falso clamore suo versus præfat'* Tho. Knyvet, *&* Johannem Freeborn, *eo quod ipsi de disseisina prædict' superius acquietati existunt*, *& prædict'* Thomas *&* Johannes Freeborn *eant inde sine die*, *&c.* And it is to be known, that at the Common Law, the Assise was *remedium maxime festinum*, *& maxime beneficiale*: *festinum*, for therein the Defendant shall not be (*b*) essoigned, nor cast a (*c*) Protection, also the Defendant shall not pray in (*d*) Aid of any but only of the King, neither shall he (*e*) vouch a Stranger, nor any Party to the Writ, unless he enters presently into the Warranty: The same Law of (*f*) Receipt: Also the (*g*) Parol shall not demur for Nonage, either of the Plaintiff nor Defendant; and in many other Respects the Assise is *Remedium maxime festinum*: it is also *maxime beneficiale*; for in no Action at the Common Law, a Man shall recover the Land it self and Damages, but only in an Assise against the Disseisor. *Vide* the Statute of *Gloucester*, *cap.* 1. And in some Case a Man shall have an Assise of *Novel disseisin* at the Common Law, when he himself is seised of the Freehold of the Land: As where the Lord, *&c.* doth often distrein, (*h*) that the Ter-tenant cannot manure his Land; in that Case the Ter-tenant may have an Assise, and the Writ shall be general, but he shall make a special Plaint, that the Lord, *&c.* did

(*a*) Antea 47. a. 49. b. Fitz. Assise 10. Br. Assise 76.

* Postea 66. a. 2 Inst. 410.

(*b*) 1 Roll. 822. 14 H. 6. 22. b. 2 Inst. 410.

21 H. 6. 42. a.

(*c*) 21 H. 6. 42. a. 2 Inst. 410. Plowd. 89. b. Br. Protect. 53. Co. Lit. 131. a.

(*d*) 2 Inst. 410. 9 H. 5. 14. a. 14 H. 6. 22. b.

(*e*) 2 Inst. 410. F. N. B. 78. e. 2 Roll. 745. 748. Plowd. 89. b. Br. Voucher 146. 9 H. 5. 14. a.

(*f*) 2 Inst. 410.

(*g*) 2 Inst. 410.

(*h*) F. N. B. 178. 2 Inst. 414. 27 Ass. 51. Br. Assise 273. 28 Ass. 50. Br. Assise 290. 4 Co. 11. b. 11 Co. 44. a.

did often diſtrain, &c. and the Judgment ſhall not be *quod Querens recuperabit ſeiſinam tenementorum prædictorum*, for the Plaintiff himſelf is ſeiſed of the Freehold; but the Judgment ſhall be that he ſhall have and hold the Land, *abſque multiplici diſtrictione*, &c. So *in caſu quo quis paſcit alterius ſeperale*, the Ter-tenant ſhall have an Aſſiſe by the Common Law. And the Stat. of *Weſtm.* 2. *(a)* *c.* 25. is but an Affirmance of the Common Law; for in the ſame Manner he ſhall have an Aſſiſe for Fiſhing in his ſeveral Piſcary, or Turbary, and the Writ ſhall be general, as appears by the Statute. But the Plaintiff in his Plaint ought to ſhew, that the Defendant claiming Common of Paſture in his ſeveral with his Cattle, &c. and the Judgment ſhall not be that he ſhall recover the Seiſin of the Tenements, &c. but that he ſhall have and hold them in Severalty; for the Plaintiff himſelf is in Seiſin of the Freehold, and therefore he cannot make his Plaint to be diſſeiſed of his Freehold; for it is not ſo; and then the Judgment would not purſue it. *Vide F. N. B.* 178. *b.* 27 *Aſſ. pl.* 30. & 51. 28 *Aſſ. pl.* 50. *Weſtm.* 2. *c.* 25.

(a) 2 Inſt. 409, 410, 411, 412, &c.

Mich.

Mich. 6 Jacobi.

Which began Hill. 5 Jac. *Rot.* 2541.

SYMS's *Case.*

JAmes *Game* brought a Formedon in the Remainder against *William Syms* and *Mary* his Wife, and demanded a Houſe, forty five Acres of Land, ſix of Meadow, &c. in *Wethermonford*, &c. in *Eſſex*, of a Gift made by *Henry Winter* to *Stephen* his Son, and to the Heirs Males of his Body, &c. the Remainder to *John* his Son, and to the Heirs Males of his Body, &c. the Remainder to *Alice Winter*, and her Heirs; and that the Demandant was Son and Heir to *Alice*, and that *Stephen* and *John* were dead without Iſſue, &c. The Tenant pleaded in bar a Fine levied by the ſaid *Stephen* to *William Brown* of the Tenements aforeſaid; by which he did grant, That he and his Heirs *Warrant' tenementa præd' cum pertinen'*, &c. *contra omnes Homines*; after which Fine the ſaid *John* died without Iſſue, and afterwards the ſaid *Stephen* died without Iſſue. *Poſt cujus mortem Warrantia ipſius Stephani prædicta in fine prædict' ſuperius ſpecificat' deſcendebat præfatæ Aliciæ ut ſorori & Hæredi prædict' Stephani*, and after the Deſcent of the Warranty the ſaid *Alice* died, *Poſt cujus mortem Warrantia prædict' deſcendebat præfat' Jacobo ut filio & Hæredi præd' Aliciæ, & petit Judicium ſi præd' Jacob' Actionem ſuam præd' contram Warran' præd'* &c. The Demandant confeſſed the Fine aforeſaid, &c. and the Death of *John Winter* without Iſſue, and that the ſaid *Stephen* died *prout*, &c. *Sed ulterius dicit quod præd' Warrantia prædicti Stepheni deſcendebat præfatæ Aliciæ ut ſorori & uni Hæredi prædicti Stephani, ac cuidam Thomiæ Rampton ut alteri Cohæredi præd' Stephani*, and

Cro. Jac. 217, 218.

shewd how, and after the Death of the said *Alice*, the said Warranty *quoad un' medietat' Tenement' prad' descendebat eidem Jacobo ut Filio & Haredi prad' Alicia*, &c. Upon which the Ten. did demur in Law, Whether the War. which descended on both the Heirs, should bar the said *Alice* and her Heir for the whole, or but for the Moiety, forasm. as the War. descended on both, and *Alice* only had Right to the said Land, was the Quest. And it was obj. That it should be a Bar but for one Moiety, because the War. doth not only desc. on her, but on the other Sister: And the Case in (a) 45 *Edw.* 3. 23. *a. b.* was cited, which is abridged by *Br.* **Garrantie* 14. where he abridges the Case to this Effect: Husb. and Wife Tenants in special Tail, to them and the Heirs of their Bodies, have Issue a Daughter, the Husband discontinues the Estate Tail with War. and the Wife dies; and he took another Wife, and had Issue anoth. Daughter, the Husb. dies, the elder Daughter took Husb. and they brought a Formedon, &c. and the Tenant did rebut for one Moiety by Reason of the War. and Assets, and recov. for the other Moiety, for he could not rebut for the other Moiety, because the War. did not desc. only on her. But it was resolved by *Coke* C. J. & *tot' Cur'*, That in the Case at Bar, *Alice* and her Heir was barred for (b) the whole; for the War. is entire, and extends to the whole Land, and is a Bar to every Person on whom it descends of all the Right which she had in the Land; and if each of them had Right jointly or sev. each is barred; and if one only had Right, and the other nothing, she which had the only Right shall be barred of the whole, for as to that purp. the whole War. desc. to each of them. And therewith agrees a Case adj. in the Point in 5 *Edw.* 2. *War.* (c) 78. where *Sibil* brought a *Sur cui in vita*, of the Seisin of *Margery* her Grandm. the Ten. pleaded, That the said *Sibil* is Coheir with *Elin* and *Maud*, to one *Walter* their Cousin, whose Heirs they are, and that the said *Walt.* did enfeoff the Ten. with War. Judm. &c. and there it is obj. That in the manner as one shall vouch, he ought to rebut, but you can't vouch us, (*quasi diceret*, that he should not vouch one only, because the War. desc. on all, and in the like manner, that he should not rebut only against one, but it ought to be for a 3d Part, because the Demand. is not sole Heir to the War.) To which (d) *Hervy*, C. J. answ. You are three Coheirs, and the Tenant may bar you all, *ergo*, one alone; and he shews the Deed with Warranty, of *Walter*, whose Heirs you are, which you do not deny, wherefore, by Judgment of the Court, you shall take nothing, &c. And therewith agrees 4 *Hen.* 7. 18. *b.* where it is held, That if three (e) Coparceners alien in Fee with Warranty, every Warranty shall be collateral to the other, and yet the Warranty of her who first dies, descends on both the others. The Case in 6 *Edw.* 3. 50. *a. b.* was in effect, That *A.* seised

(a) Fitz. Vouch. 73. Postea 52. a. 1 Mod. Rep. 182. * Postea 52. a. b.

(b) Cr. Jac. 218.

(c) Co. Lit. 373. b. 1 Mod. Rep. 182.

(d) 1 Mod. Rep. 182, 183.

(e) Fitz. Garranty 6. Br. Garranty 56.

A. seised of three Acres, made a Feoffm. to one *B.* with War. and died seised of the other two, having Issue two Daughters, who made Partit. and each had one Acre, the Wife of *A.* purchased the Part of one Coparcener, and afterw. brought a Writ of Dower against *B.* who vouched the two Daughters and Heirs of *A.* the one (who had enfeoffed the Demand. of her Part) entred into the War. as one who had nothing by Desc. the other pleaded all the said spec. Matter, pretending, that forasm. as the Demand. had purchas'd the Part of one, that she should not recov. the whole in Value against the other, but for a Moiety, because the War. did desc. on both. But it was adj. That she should recov. the whole Value against her who had by Desc. for when two Heirs are vouched, and the one hath nothing, the other who hath, shall answer the whole in Value, and yet the War. did not desc. upon him alone. And it was lawful for the Wom. Demand. to purchase the Part of one, and therefore it shall not prej. her. *Vide* (*a*) 11 *H.* 4. 20. *a. b.* 41 *Ed.* 3. 3. (*b*) 10 *H.* 7. 13. And it was said, That the Book in (*c*) 45 *Ed.* 3. 23. *a. b.* doth not war. any such Opin. as hath been collected, for the princip. Case in the Book at large (which is the Fountain it self) is, that in a *Præcipe quod reddat* the Tenant did vouch two as Heirs, and said, that one was within Age, and prayed that the Parol might demur; the Demand. said, That he was full of Age, and prayed that he might be inspected in Court; upon which Process was awarded 'till *Sequatur sub suo periculo*, at which Day he came not, nor no Writ was return'd, and the Demand. prayed Judgm. for the Moiety, because one of them who was vouched made Default, and prayed *Summons ad War'* against the other; to which the Demand. said, That *Summons ad War'* he could not have, because he who is vouched is Demandant. To which the Ten. said, That the Ancestor of those who are vouched by Deed which here is, did enfeoff one *R.* with War. whose Est. we have, Judgm. if against the Deed; with Averm. that he had Assets by Desc. To which the Demand. said, That he had nothing by Desc. And the Court gave Judgm. for one Moiety in respect of the Default of one of the Vouchees which the Tenant had lost by his Voucher, for which Moiety he could plead nothing; and for the other Moiety, altho' he had vouched the Demand. by a strange Name, and so in a manner pleaded in chief, yet forasm. as the Demand. had toll'd him of this Voucher as to him, because he is Demandant himself, he might plead the Warranty and Assets in bar for the other Moiety. Upon which Plea no Judgment is given in the Book, and therefore the Court regarded not the said Collection or Inference of the Lord (*d*) *Brook*, forasm. as the Book is adjuded on another Point, *scil.* on Default of one of the Vouchees; but it was affirmed *per totam*

(*a*) Br. Garranty 21. Br. Recovery in Value 38.
(*b*) Br. Garranty 77.
(*c*) Antea 51. b. Fitz. Voucher 73. Br. Garranty 14. 1 Mod. Rep. 182.
(*d*) Br. Garranty 14. Antea 51. b. Postea 52. b.

tam Curiam, That in the ſaid Caſe of War. and Aſſets, the lineal War. is as entire as the colat. War. but inaſmuch as the (a) lineal War. is not a Bar to the Iſſue in Tail without Aſſets, and Aſſets is to be adj. according to the Value, which may be more or leſs; for this Reaſ. the lineal War. ought to follow the Aſſets, becauſe without Aſſets the lineal War. is no Bar. As if War. and Aſſets be pleaded in a Formedon brought of four Acres, each of the yearly Value of twelve Pence, and Iſſue is taken on the Aſſets, and it is found that but one Acre of the Value of twelve Pence deſc. it is no Bar but for one Acre, as it is held in 40 *E.* 3. 15. *a.* (b) 21 *E.* 3. 9. *b.* againſt the Book in 21 *Edw.* 3. 38. *b.* But otherwiſe it is in Debt or * Annuity brought againſt the Heir, becauſe Lands of their Nature are diviſible, and the Demand. in Formedon may recov. Part, and be barred of the Reſidue; but Debt and Annuity in ſuch Caſe are entire, and not diviſible, as it is ſaid in 5 *R.* 2. *Annuity* 21. *Annua nec debitum* (c) *Judex non ſeparat ipſum.* And the Opinion of the Lord *Brook*, altho' it was not well col. out of the Book, was affirmed for good Law, if the juſt Aſſets of the Land in demand, and no more deſcends on the Demand. and the other Daughter, for then the Demand. ought to recov. the Moiety, becauſe ſhe hath no Aſſets, but as to one Moiety, and the lineal War. only is no Bar. But if the Moiety of the Land which deſc. on the Demand. be of equal Value to the Land in demand, ſhe ſhall be barred of the whole, for a lineal War. when Aſſets to the Value of the Land in demand deſcend, is as entire and full a Bar as to the Demand. as a col. War', deſc. the War. in the one Caſe or in the other, on the Demand. only, or on her and any other. And the Stat. of *Glouceſter c.* 3. (e) enacts, That if the War. of the Ten. by the Courteſy be pleaded, the Heir of the Wife ſhall not be barred by the Deed of his Fath. from whom no Inherit. deſc. *&c.* And if Inherit. doth deſc. from the Part of the Fath. then be he barred of the Value of the Inherit. which deſcends to him. By Force of which Stat. the collat. War. which without Aſſets was a Bar entirely to the whole by the Com. Law, is now but a proport. Bar, having reſpect to the Aſſets deſc. and the lineal War. and Aſſets pleaded in Formedon in Deſcender, is taken within the Equity of the ſaid Act; as it is reſolv'd in 11 *Edw.* 2. (f) *Statham Gar.* 21 *Edw.* 3. 28 *b.* 38 *Edw.* 3. 23. *a. b. &c. Plowd. Com. in Fulmerſton's Caſe, fol.* 110. *a.* But where in the ſaid *Fulmerſton's* Caſe it is ſaid, If in the one Caſe or the other there be no Aſſets deſcended at the Time of the Aſſiſe of *Mortdanceſter*, or *Formedon* brought, but (g) afterwards Aſſets deſcend, that the Tenant ſhall have a *Scire facias* in the Caſe of Warranty made by Tenant by the Courteſy, to have the Land which was of the Seiſin of his Mother, and not of the Aſſets by the expreſs Purview of the ſaid Statute

(a) Co. Lit. 374. b.

(b) Plow. 440. 2. b. Poſtea 134. b. Br. Warrantia Chartæ 30. In Medio.
* 2 Inſt. 293.

(c) Hetl. 53. Lit. Rep. 61. Co. Lit. 150. 2.

(d) Antea 51. b. 52. a. Br. Garranty 14.

(e) Co. Lit. 365. a. b. 366. a. 2 Inſt. 292, 293, 294. Plowd. 110. a. 21 H. 7. 11. a. Wing. Max. 23.

(f) 11 Ed. 2. Statham Garranty 24. 21 E. 3. 28. b. 29. a.

(g) Co. Lit. 366. a. Plowd. 110. a.

Statute of *Glouceſter*, and in the Caſe of Warran. made by Tenant in Tail, which is taken within the Equity of the ſaid Act, the Iſſue in Tail ſhall have a (a) *Scire fac'* to have the Aſſets which afterwards. deſcend, and not the Land given in Tail; and Equity is the Reaſ. that the Caſe taken within the Equity of the form. Law ſhall not fol. the Purview thereof, but ſhall have anoth. and diverſe Conſtruct. for Equity requires that Incertainty ſhould be avoided, as the Author of Contention, and that there ſhould be an End of Contro. accord. to Equity and Right, the final End of all Laws: And theref. the ſaid Stat. of *Glouceſt'* well provided an abſolute and juſt End in the Caſe of Ten. by the Courteſy of Land in Fee-ſimp.; for when the Ten. in ſuch Caſe after Aſſets deſcended, recovers the Inher. of the Moth. which he hath purch. it makes an End of that Contro. ſo that the Demand. or his Heirs ſhall be by Force of the Act barred for ever to claim the Land. But if in the ſaid Caſe of * Formed. the Ten. after Aſ. deſc. ſhall have a *Scire facias* for the Land intailed, then if the Aſ. ſhall be aliened, the Iſſues inherit. to the Eſtate Tail may by Writ of Formed. in Deſc. recov. the Land in Tail, which will be Cauſe of new Suit and Contention and will not anſw. the final Intent. of the Purview of the ſaid Act; and theref. accord. to the Rule of Wiſd. (b) *Sapiens incipit a fine*, to make a perpet. Bar as well in that Caſe as in the oth. it was adj. reaſonab. and conſon. to the final Intent of the Makers of the ſaid Act, That in that Caſe of an Eſtate Tail the Ten. ſhould have a *Sci' fa'*, to have the Aſ. which deſc. to the Iſſue in Tail in Fee-ſimp. which as to them ſhall be a perpet. Bar againſt him and his Heirs, which in juſt and proport. Equity, agrees with the oth. Caſe. *Vide* (c) 43 *E.* 3. 26. *a.* & (d) 40 *E.* 3. 39, &c. Where it is held, That if War. and Aſ. be pleaded againſt the Iſſue in Tail, and if the Demand. hath nothing by Deſc. and Land deſc. to the Iſſue afterw. he ſhall have a *Scire fac'* to have the Value. But it is in none of the ſaid Books expreſſed, how the Ten. ſhall demean himſ. in Pleading to take Adv. of the Aſ. which deſc. afterw. And theref. if in a (e) *Mortdan'*, *Coſinage*, *Aiel*, *Beſaiel*, &c. the Ten. pleads the War. of the Ten. by the Courteſy with Aſ. or in a Formed. the Ten. pleads a lineal War. and Aſ. and the Demand. takes Iſſue on the Aſ. and it is found by Inq. that nothing deſc. whereby the Demand. recov. and aft. that Recov. Aſ. deſc. the Ten. ſhall never have a (f) *Scire fac'* to take the Benefit of the ſaid Act, for divers Reaſ. 1. Becauſe the ſaid Trial is (g) as peremp. to him, as if Aſ. had been found by the Inq. it had been to the Demand. 2. There is no Record on which he can ground his *Scire fac'*. 3. By the puting himſ. upon the Trial of Aſ. he hath waved the Adv. which he might have taken upon the ſaid Act. 4. He who will take Benefit of that Act, ought not to begin with a Falſity. But if the Ten. will take Ben. of the ſaid Act, he ought to plead the War. and acknow. the Demand.

(a) Co. Lit. 366. a. Plowd. 110. a. 2 Inſt. 293.

* 2 Inſt. 293. Plow. 110. a. Co. Lit. 366. a.

(b) 10 Co. 25. b. Co. Lit. 70. b. 127. b.

(c) Br. Scire fac' 29. 17. Br. Aſſets per Diſcent 32. Br. Diſcontinuance de Poſſeſſion 30.

(d) Statham Formedon 2. Br. Aſſets per Diſcent 17.

(e) 2 Inſt. 293, 294.

(f) Co. Lit. 366. a. Cr. Car. 373. 2 Inſt. 293.

(g) 4 Leon. 136. Noy 149.

Demand. Title, and pray that the Advant. of the Stat. when Aſ. ſhall deſc. be ſaved to him, *&c.* and upon that Record, when Aſ. deſc. he ſhall have (*a*) *Sci' fa'*, and that ſtands with the Let. and Intent. of the ſaid Act; for the Words are *(by Writ of (b) Judgm. which ſhall iſſue out of the Rolls of the Juſtices.)* So that the *Scire fac'* ought to be grounded on the Rolls of the Juſtices. Alſo the Stat. goes farth. To reſummon the War. as it hath been done in oth. Caſes, *ſcil.* where the Warrantee or Vouchee comes into C. and ſaith, That nothing is deſc. to him from him by whoſe Deed he is vouched, *&c.* which if the Ten. doth not deny, *&c.* he ſhall have the Ben. of the Aſ. which ſhall afterw. deſc. to the Vouchee; but if he takes Iſſue that Aſ. deſc. to him, and that by Inq. be found againſt him, that nothing deſc. he ſhall never have any Ben. of the Aſ. which ſhall afterw. deſc. to the Vouchee. But it was ſaid, If Aſ. be found by Inq. but not to the (*c*) Value, there the Demand. ſhall have Ben. of the Aſ. which afterw. deſc. becauſe the Vouchee's Plea is falſe; and on the oth. Part, it would be hard to drive the Demand. who is a Stranger, to know the preciſe Value of the Land which the Vouchee hath by Deſc. but he may well take Knowledge, whether he hath any Land by Deſc. from the ſame Anceſt. or not. And in this Caſe divers good (*d*) Differences were obſ. which do appear in our Books. 1. Between a collat. War. and an Eſtoppel; for a collat. War. binds the Right of him who claims not by him who makes the War. but an Eſtoppel ſhall bind only the Heir who claims the Right of him to whom the Eſtop. was: As at the Com. Law, bef. the ſaid Stat. of *Glouceſter, cap.* 3. If the Huſb. had aliened the Land which he had in the Right of his Wife with War. and the Huſb. and Wife died, in that Caſe the Right deſc. from the Wife, and yet that War. being collat. to the Title of the Land, ſhould bar the Wife's Heir. But it is adj. in 18 *Edw.* 3. 9. *b.* That where (*e*) Lands were convey'd to the Huſb. and Wife, and to the Heirs of the Huſb. and the Huſb. gave them in Tail, and the Huſb. died, the Wife ſhould recov. the Land againſt the Donee by Writ of *Cui in vita*, ſuppoſing that ſhe had the Lands to her and her Heirs in Fee; the Wife aft. the Recov. enfeoffed anoth. and died, the Donee in Tail died without Iſſue, the Iſſue of the ſaid Huſb. and Wife, brought a Formed. in the Reverter againſt the Feoffee of the Wife; and altho' the Iſſue was Heir to the Wife who was eſtopped by the ſaid Recov. in the *Cui in vita*, to ſay that ſhe had a leſſer Eſtate than a Fee-ſimp. yet the Iſſue who claims the Rever. of the Land as Heir to the Huſb. ſhall not be (*f*) bound by that Eſtop. made by the Wife, altho' he be Heir to her alſo, for then by her own Act, the Wife who had but an Eſtate for Life, might bar the Heir who had Right, and who claim'd as Heir to his Fath. But a collat. War. cannot take Effect without the Act of God, *ſcil.* the Death of him who makes it, and in the mean time the Eſtate to which, *&c.* may be debated. But in this Point the Warranty and the Eſtoppel

(*a*) Cr. Car. 373. Co. Lit. 366. a. 2 Inſt. 293, 294.

(*b*) Plow. 110. a. 2 Inſt. 294. Co. Lit. 366. a. 365. b.

(*c*) Co. Lit. 366. a.

(*d*) Co. Lit. 365. b

(*e*) Co. Lit. 365. b. Fitz. Eſtop. 215.

(*f*) 1 Jones 459. Cr. Car. 525. Co. Lit. 365. b.

concur, both which ſhall deſcend on the general (*a*) Heir, to him who made the War. or Eſtoppel, and not on the particular Heir, as on the younger Son, and not on the Siſter of the half Blood, *&c.* as appears in (*b*) 35 *H.* 6. 34. and as the Heir who doth not claim the Land as Heir to him who made the Eſtoppel, as hath been ſaid, ſhall not be bound thereby for his Diſadv. So in the ſame Caſe he ſhall not be capable of Advant. unleſs it be in ſpecial Caſes; and therefore it is adjudg'd in 38 *Ed.* 3. 10. *a. b.* That if a Wom. (*c*) *Meſne* binds her ſelf to acquittal to the Tenant and his Heirs, and after the Woman takes a Huſb. and the Tenant by his Deed grants to the Huſb. that he nor his Heirs ſhall be bound to the ſaid Acquittal, and afterw. the Huſb. and Wife have Iſſue and die, this Iſſue altho' he be Heir to the Huſb. yet becauſe the Line of Acquittal deſcends to him as Heir to his Moth. he ſhall not be capable of the ſaid Advant. of the ſaid Diſcharge, *quia* (*d*) *Hæres dicitur ab hæreditate, & non hæreditas ab Hærede.* But therein alſo there is a Difference between Advantages in groſs, as in the Caſe of (*e*) 38 *E.* 3. and Advantages which by the Grant are made appurtenant or incident to anoth. thing: As if a Man be ſeiſed of a Houſe in the Right of his Wife, and another grants to the Huſb. and his Heirs, to have ſuffici. Eſtovers to burn in the ſame Houſe, in that Caſe the Eſtovers are appurtenant to the Houſe, and ſhall deſcend to the Iſſue of the Huſband and Wife. So if one hath a Houſe of the Part of his Moth. and one grants to him, that he and his Heirs ſhall have competent Houſebote to be burnt in the ſame Houſe, this is appurtenant to the Houſe; and altho' it be a new Purchaſe, yet it ſhall go with the Houſe to the Heir of the Part of the Mother. The ſame Law if a Man hath a (*f*) Rent-ſeck by Deſcent of the Part of his Mother, and the Ter-tenant grants to him and his Heirs, that they ſhall diſtrein for the Rent, *&c.* this is as appurtenant to the Rent, and ſhall go with the Rent to the Heir of the Part of the Mother; and ſo it is held in (*g*) 5 *E.* 2. *Avowry* 207. in *Jordan*'s Caſe. That where *Alice* was ſeiſed of a Mannor in Fee, and took to Huſband one *Jordan*, and had Iſſue *Sibil*; and afterwards *Jordan* and his Wife died, and *Sibil* was ſeiſed of the Mannor, as Heir of the Part of her Mother, who before the Statute of *Quia Emptores terrarum* did enfeoff *P.* of Parcel of the Mannor by four Shillings Rent, and afterwards *Sibil* died without Iſſue: And there the Queſtion was, Who ſhould have this Seigniory and Rent of four Shillings newly created, whether the Heir of the Part of the Mother, or the Heir of the Part of *Jordan* the Father? And there *Beresford* Chief Juſtice of the Bench, held, When *Sibil* enfeoffed *P.* of Parcel of the Mannor which deſcended to her from *Alice*, theſe Services were then appurtenant to the Remainder of the Mannor, wherefore the Death of *Sibil* without Heir of her Body, could not defeat that Appendance,

(*a*) Co. Lit. 12. a. 337. b. Hob. 31.

(*b*) Hob. 31. Br. Eſtoppel 23. 9 Co. 9. a. Plow. 136. a. b. 35 H. 6. 33. b. 34. a. Fitz. Eſtoppel 57.

(*c*) Co. Lit. 13. a. Fitz. Meſne 24.

(*d*) Co. Lit. 8. a. 3 Co. 89. a.

(*e*) 38 E. 3. 10. a. b. ſupra.

(*f*) Co. Lit. 12. b. 13. a.

(*g*) Co. Lit. 12. b. Br. Tenure 86.

pendance. So it is held in 7 *H.* 6. 4. *b.* That if a Man be
(a) Co. Lit. 12. b. 1 Co. 100. b. Br. Diſcent 11. ſeiſed of Land of the Part of his (*a*) Mother, and maketh a Gift in Tail rendring Rent, this new Rent which is incident to the Reverſion, ſhall go with the Reverſion to the Heir of the Part of the Mother. And it is to be known
(b) 2 Balſtr. 43. that there is a (*b*) Difference between Eſtoppels or Concluſions which ſtand upon Recompence, and other Eſtoppels which ſtand upon Affirmance or Admittance of any Matter by Matter of Record: As if an Abator marries with the right Heir, and has Iſſue by her, and the Abator makes a Leaſe for Life rendring Rent, and he and his Wife die, in this Caſe the Iſſue has the meer Right of the Part of his Mother and yet if he accepts the Rent, and makes Acquittance, it ſhall eſtop him and his Heirs to avoid the ſaid Leaſe, in reſpect of the Acceptance of the Recompence; and therewith agrees 39 *H.* 6. 27. *Vide* 28 *H.* 6. 24. But an Eſtopel which accrues by Admittance, *&c.* of Record, ſhall not conclude
(c) 18 E. 3. 9. b. Antea 53. b. Co. Lit. 365. b. Fitz. Eſtop. 219. the Heir who claims not the Right by the ſame Anceſtor, as it is adjudged in (*c*) 18 *E.* 3. aforeſaid.

Mich

Mich. 6 Jacobi Regis.

Roger *Earl of* RUTLAND's *Case.*

ROger Earl of (a) *Rutland* brought an *Assise of Novel Disseisin* againſt *Gilbert* Earl of *Shrewsbury*, and others, complained he was diſſeiſed of his Freehold in *Clipſon*, in the County of *Nottingham*, and made his Plaint to be diſſeiſed *de* (b) *Officio Cuſtodis parci, vocat' Clipſon Par, ac de Pannagio & Herbagio prad' parci de Clipſon prad' cum pertinen', & pro Titulo Liberi Tenementi de Officio prad' ac de Pannagio & Herbagio prad'*, the Plaintiff ſaid, That Queen *Elizabeth* was ſeiſed of the ſaid Park in Fee, in the Right of her Crown, and 19 *March*, *An.* 10. by her Letters Patents granted to *Thomas Markham*, *Ar' Officium Cuſtodis parci ſui, vocat' Clipſon Park*, (without ſaying *prædict'*) *ac eundem Tho' Markham prad' parci ſui vocat' Clipſon Park, fecit, ordinavit, & conſtituit per eaſdem Literas Patentes*, To have and to hold to him for Term of his Life, with all Fees due and accuſtomed: And further granted by the ſaid Letters Patents, to the ſaid *Thomas Markham*, *Pannagium & Herbagium prædict' Parci ſui de Clipſon*, To have and to hold the ſaid Pannage and Herbage to the ſaid *Thomas Markham* for Term of his Life. And afterwards Queen *Eliz.* ſo ſeiſed of the ſaid Park as is aforeſaid, died thereof ſeiſed. After whoſe Death the ſaid Park deſcended to the King that now is; *Ac prad' Tho. Markham de prad' Officio & Pannagio & Herbagio prad' in forma prad' ſeiſit' exiſt', idem Dominus Rex 9 die Junii An. Regni ſui primo per Literas ſuas Patentes, &c. recitando prad' Statum prad' Tho. Markham de & in Præmiſ. prad', Sic, ut præfert', Sibi conceſſis, conceſſit eidem Com' Rutland' prad' Offic' Cuſtodis prad' Parci, voc' Clipſon Park*, To have and to hold to him for his Life, *quam* (c) *Officium prad' per Mortem, Surſum redditionem, Forisfacturam vel aliquo alio modo quocunq; vacaverit*, with all Fees, *&c.* And further granted by the ſame Letters Patents, the ſaid Herb. and Pan. to the ſaid E. of *Rut.* for Term of his Life (without ſhewing when the Eſtate of the Herb. and Pan. (c) ſhould begin)

(a) 1 Bulſt. 45. 2 Brownl. 229, 230. Jenk. Cent. 283.

(b) Antea 47. a.

(c) 2 Brownl. 229, 230. 234. 242. Jenk. Cent. 283. 1 Brownl. 27.

adeo

adeo plene & integre prout præd' Tho. Markham, &c. habuit, tenuit, seu gavisus fuit, &c. And afterwards the said *Tho. Markham, 9 Martii, Anno quarto Regis nunc* died, after whose Death the Plaintiff was seised of the said Office, and of the Herbage and Pannage, 'till disseised by the Defendants. To which the Defendants pleaded the general Issue, *Nul tort, nul disseisin*, and as to the Office, the Recognitors of the Assise found for the Plaintiff; and as to the Herbage and Pannage, they found the Letters Patents at large *ut Supra*, and if the Herbage and Pannage past by the said Letters Patents to the Plaintiff, they found for the Plaintiff, *&c.* And the Matter in Law was such, The King grants the Herbage and Pannage of the Park of *C.* to *Markham* for Life, and afterwards the King reciting the Grant to *Markham*, and that he is living, grants the Herbage and Pannage of the said Park to *R.* Earl of *Rut.* for his Life, without shewing when it shall (*a*) begin. And if the Grant of the Herbage and Pannage to *R.* Earl of *R.* were good or not, was the Question. And it was objected, That the said Grant to the Earl of *R.* was void for the Incertainty of the Beginning thereof, for it cannot begin presently, because *Markham* had it there for his Life, and it doth not appear whether the K. intended it should begin after the Death of *Markham*, or Forfeiture, or Surrender, or when it should begin, and for such Incertainty the Grant in the K's Case shall be void. And the Cases in (*b*) 3 *H.* 7. *casu ult.* (*c*) 6 *H.* 7. 14. *a.* and (*d*) 8 *H.* 7. 12. *b.* were cited that the K. cannot grant the (*e*) Reversion of an Office which one hath for the Term of his Life; but may recite that such one, *habeat & teneat tale Officium pro termino vitæ suæ*, and grant *Offic' præd' tali, habend' post mortem, &c.* but if the K. grant the Office to another (without such special Recital) for Life the second Grant is void. *Vide* 11 *E.* 4. 1. *b.* 32 *E.* 3. *Avowry* 112. But it was resolved by *Coke* Chief Justice, *Walmsley, Warburton, Daniel*, and *Foster*, Justices, That the said Grant of the Herbage and Pannage was good; and in this Case divers Points were resolved: 1. That the K. has divers Manners to Inherit. 1. Some to give only in Posses. and not in Rever. as a Corody in a House of Relig. or to present one to a Church of his Patronage, as it is agreed in 39 *H.* 6. 48. for in these Cases, and other like, the K. has but a Presentat. or Commendat. of a Person when the Corody or Church is void, and not bef. and can't give the Corody, or present to the Church in Rever. 2. The K. has some Inherit. which the K. may grant as well in Rever. as in Posse, but he cannot use or exer. them himself as (*f*) Offices, *vide* 1 *H.* 29. *b.* a Man grants an Office of Serv. as Forestership, *&c. omnibus terris eidem Officio pertinentibus*, the Remaind. to the K. in Fee; in this Case, altho' the K. cannot be Officer to any one, yet the K. is capable thereof, to grant the Office to another, who he himself cannot use or exer. also such Office may be forfeited to the King, and the King shall have an Inheritance in it to give

(*a*) 2 Brownl. 229, 230. 234. 242. Jenk. Cent. 283. 1 Brownl. 87. Postea 56. b.

(*b*) Br. Patent 52. Fitz. Grant 35.
(*c*) Br. Patents 54.
(*d*) Br. Patents 57. Fitz. Grant 42.
(*e*) Postea 57. a. 10 Co. 61. a. Dyer 80. pl. 58. 11 Co. 4. a. March. Rep. 41. Cr. Car. 279. Dyer 259. pl. 18. 2 Rolls 154. Co. Lit. 3. b. Hob. 150, 151. 4 Inst. 202. 11 E. 4. 1. b. Cr. Jac. 17, 18.

(*f*) 10 Co. 61. a. Co. Lit. 3. b. Bridg. 30. 1 H. 7. 29. b. Br. Prerogative 125. Br. Grant 83. Fitz. Grant 32. Plow. 381. 379. b. 19 H. 7. 18. b.

(*h*)

give, &c. *Vide* (a) 3: 6. (b) and (c) 8 *H.* 7. before. 3. Other Inheritances the King has, as well to use and enjoy himself, as to grant to another, *scil.* the Possession, Remainder, or Reversion; as Houses, Lands, Rents, Commons, Herbage and Pannage, and the like, which are Parcels of his Inheritance. 2. It was resolved, That the King was not (d) deceived in his Grant, for he has recited the Estate of *Markham* which he had in the Herbage and Pannage for Term of his Life, and that *Markham* was then living, so that the King well knew that he could not grant that in Possession, which another then held for his Life, but it ought to take Effect as it might by Law. And the Case of the Lord *Chandos*, in the sixth Part of my *Reports*, was resolved to be a stronger Case, for there the King mistook the Law, thinking that by the surrender of the Letters Patents, the Estate Tail was extinct, and that he thereupon was seised in Fee, and therefore he granted the Mannor in Possession, and yet the (e) Reversion did pass without any Word of Reversion, for the Grant ought to take Effect, as by Law it may; which Case of the Lord *Chandos* was affirmed to be good Law, *per totam Curiam.* But in the Case at Bar the King mistook nothing, nor took upon him to grant that which he could not grant, nor was deceived in any Part of his Grant: And when the King's Charter may be taken (f) to two Intents good, in many Cases it shall be taken to such Intent as is most beneficial for the King; but if it may be taken to one Intent good, and to another Intent void, then for the King's Honour, and for the Benefit Benefit of the Subject, it shall be taken in such Manner as the King's Grant may take Effect, for it was not the King's Intent to make a void Grant. And therewith agree the Reason and Rule of the Book of (g) 21 *E.* 4. 44. *b.* where King *Richard* the Second granted to the Abbot of *Waltham*, That he and his Successors should not be *Collectores Decimarum, &c. Concess. Regi per Clerum Angliæ, nec alicujus inde parcell.* in that Case, if the Grant be taken literally *per Clerum Angliæ*, that is, *per totum Cerum Angliæ*, the Grant is void; for all the Clergy of *England* never met at one Convocation, but every Province has a several Convocation, and therefore the King's Grant shall not be taken in such Sense, for then the Grant will be void; but it shall be taken in such Sense as it may stand with Law, and that is by the Clergy, as the Clergy can grant Tenths, and that is in their several Provinces; and that is also a stronger Case than the Case at Bar, for here the Words of the Grant may well stand with the King's Meaning, *scil.* to grant the Herbage and Pannage in Reversion, for in Possession he cannot grant it; but in the Case of 21 *E.* 4. the Words of the Grant, and the King's Intent varying, the Letter gives Place to the King's Intention. And the Case of Sir (h) *John Molyns*, in the Sixth Part of my *Reports*,

(a) 3 H. 7. casu ultim. Br. Patent 52. Fitz. Grant 35. Antea 55. b.
(b) 6 H. 7. 14. a. Br. Patents 54. Antea 55. b.
(c) 8 H. 7. 12. Br. Patents 57. Fitz. Grant 42.
(d) 1 Co. 46. a. 51. a. 52. b. Moor 45. 164. 9 H. 6. 28. b. Lane 110. 2 Co. 33. b. 5 Co. 94. a. 6 Co. 29. b. 55. b. 7 Co. 12. a. 10 Co. 112. b. 11 Co. 4. b. 90. a. Hob. 223. 229. Cr. Car. 198. Yelv. 48. 2 Rolls 188. Dyer 339. pl. 47. 352. pl. 26. Co. Ent. 384. a. 41 Ass. 19. Br. Patent 38. Br. Alienat. 21. Plow. 132. a. Mod. Rep. 196. Kelw. 8. b. 12. b.
(e) 6 Co. 55. b. 56. a. 66. b. Co. Lit. 324. b. 10 Co. 107. a. b. Cr. Car. 400. 5 Co. 124. b. 4 Co. 36. a. Dyer 125. pl. 45. 233. pl. 10, 11. Plowd. 155. a. 159. a. 30 E. 1. Grant 86. 7 E. 4. 20. Fitz. Feof. 22. Fitz. Grant 97. 35 H. 8. Br. Grant 50. 2 Rol. Rep. 180. 277, 278. Hob. 224. Lane 3. 7. Br. N. C. 267. Lit. Rep. 18. 2 Brownl. 234.
(f) 1 Co. 45. a. 8 Co. 167. a. 11 Co. 11. a. b. 1 Bulst. 6. 10 Co. 67. b. Kel. 175. a. 198. a. 2 Siderf. 141. 3 Leon. 243. 2 Rolls 3, 4. a. b. 200.
(g) 3 Keb. 234. Dyer 269. pl. 19. Br. Patent 71. 90. 1 Co. 45. a. Br. Exemption 9. 8 Co. 167. a. 11 Co. 11. b. Plow. 32. a. 126. a. 143. b. 331. b. Fitz. Gr. 29. Br. Exposit. 28. Moor 165. Hard. 500. 2 Rol. Rep. 275. 2 Siderf. 82.
(h) 6 Co. 6. a. Postea 77. a.

was cited, in which Case also the Words were against the King's Intent, for at the Time of the Grant there was not any Chief Lord, for then all Seigniories were extinguished; but yet for (*a*) the King's Honour, and to make his Grant take Effect, it was adjudged, that the Tenure was revived.

(*a*) 6 Co. 6. a.

3. It was resolved, That there was not any Incertainty in the said Grant of the Herbage and Pannage to the Plaintiff, when it should take Effect in Possession; for it shall (*b*) begin when the first Grant shall be ended or determined, and although it may determine by sundry Ways, *scil.* Death, Surrender, or Forfeiture, yet it can determine but once, and which of them first happens, then the Grant to the Plaintiff shall begin; So that there is not any Incertainty in this Grant, for it is implied in Law, that the second Grant shall begin after the Determination of the first Grant, & (*c*) *expressio eorum quæ tacite insunt nihil operatur.* And therefore, if the King reciting that such a one holds the Mannor of *D.* for his Life, grants the said Mannor to *B.* for his Life; in this Case the Law implies, that the second Grant shall take Effect after the Determination of the first Grant; the same Law of a Gift in Tail, or a Grant in Fee. And it was said by *Coke* (*d*) Chief Justice, and affirmed by the other Justices, That of late Times such nice and strict Construction hath been strained by some of Letters Patents to subvert the Force and Effect of them, that many good Letters Patents are drawn in Question, which is to the King's Dishonour, the Disinherisin of the Subject, and against the true Reason and ancient Rule of the Law, as appears in all our Books, & *talis cerritudo certitudinem confundit*, such nice and captious Pretence of Certainty confounds true and legal Certainty, & (*e*) *maledicta Expositio est quæ corrumpit & confundit Textum.* And it was said, That it was resolved in Auditor *King*'s Case, That where Queen *Eliz.* granted a Mannor to *B.* (*f*) and his Heirs, (in the Premises of the Letters Patents.) To have and to hold the said Mannor to *B.* and his Assigns (leaving out Heirs in the *Habendum.*) that the Fee of the Mannor did pass by the Premisses of the Letters Patents, and the *Habendum* was void; for the Premisses were certain enough to pass the Fee-simple, and the Omission of Heirs in the *Habendum* should not overthrow that which was certain in the Premisses. Which Case was affirmed for good Law, *per totam Curiam*, for the Queen's Intent appeared to pass the Fee-simple by the Premisses, and her Grant ought to be construed (*g*) *secundum intentionem Regis, & non in deceptionem Regis*; and when a literal and strict Construction is made to make his Grant void, *contra intentionem Regis*, it sounds in Deceit of the King, and is a great Indignity to him; *propter apices juris* to make his Charter under the Great Seal, of Things which he may lawfully grant, void and of none Effect, *quia* (*h*) *apices juris non sunt jura.*

(*b*) Antea 55. a. b. 2 Brownl. 229, 230. 234. 242. Jenk. Cent. 283. 1 Brownl. 47.

(*c*) 10 Co. 39. a. Hob. 170. 1 Mod. Rep. 190. Lit. Rep. 111. Hard. 92. 1 Rolls Rep. 310. 2 Ro. Rep. 393. Palm. 433. 437. Wing. Max. 235. 4 Co. 73. b. 5 Co. 11. a. 8 Co. 145. a. 11 Co. 60. a. Co. Lit. 191. a. 205. a. 2 Inst. 365. 2 Sand. 351. 2 Bulst. 131. Larch. 25.

(*d*) Wing. Max. 27.

(*e*) Wing. Max. 26. 2 Co. 24. a. Postea 154. b. 3 Bulst. 105. 107, 108. 1 Rol. Rep. 319.

(*f*) Jenk. Cent. 283. 2 Rol. Rep. 361.

(*g*) 3 Bulst. 3. 14. 1 Co. 49. a. 1 H. 7. 13. a.

(*h*) 2 Ro. Rep. 361. 6 Co. 65. a. Co. Lit. 283. a. b. 304. b. Noy 30. 10 Co. 126. a.

And

And as to the Case of Office, it was said; That the said Books which were cited, prove that the King can't grant (a) *reversionem Officii*, for he has no Reversion, but an Inheritance grantable in Reversion. Also when one is Officer for Life, if the King, without (b) reciting it, grants the Office to another for Life, the second Grant is void for want of a Recital: But no Book saith, That if the King recites the first Grant of the Office, *&c.* and that the Officer is living, and grants the Office to another for Life, that this last Grant shall be void, for want of Certainty of the Beginning; for the Law, upon the Matter which appeareth, shall limit the Beginning, to the end the King's Grant shall not be void. And Exception was taken to the Plaint, forasmuch as in alledging the Grant made to the said *Tho. Markham*, the Plaint is, That Queen *Elizabeth* did grant *Officium Parci sui vocati Clipson Park* (without saying (c) *prædict'*) and therefore it was objected, It shall be intended another Park. But it was resolved, That upon Consideration of all the Parts of the Plaint, it appears, that it was the same Park: For the Plaintiff begins his Plaint, *Pro titulo liberi tenementi de Officio prædicto:* Also he shews, that Queen *Eliz.* was seised, *&c. de Parco prædicto*, and so seised, granted *Officium Parci sui de Clipson*, which ought to be intended the same Park whereof the Seisin was alledged at the Time of the Grant, and *eo potius* in respect of this Pronoun Possessory *(sui)* and in all other Parts of the Plaint *(prædict')* is added: So that it is well said in *Long*'s Case, in the Fifth Part of my *Reports*, That there are Three Manners of (d) Certainties: 1. Certain to a common Intent, and that sufficeth in Bars for those who defend themselves: 2. To a certain Intent in general, and that is sufficient in Indictments, Plaints, Counts, Replications, *&c.* 3. To a certain Intent to every particular Intent, and that is rejected in Law, for there it is said, *Quod talis certitudo certitudinem confundit*; and so it was adjudg'd in the Point, in the Assise brought by the Lady (e) *Russel*, against the Lord Admiral; and this Assise being (after a general Verdict for the Plaintiff for Part, and a special Verdict for the Residue) adjourned into the Common Pleas, Judgment was there given: But Assise ought to be brought *in* * *proprio Comitatu*, by the Statute of *Magna Charta*, (f) *cap.* 12.

And afterwards on this Judgment, a Writ of (g) *Error* was brought, and all that which was resolved by the Court of Common Pleas, was affirmed for good Law, by *Fleming* Chief Justice; *Fenner*, *Yelverton*, *Williams*, and *Crook*, Justices of the King's Bench. But for other *Errors* not assigned nor moved in the Commons Pleas, in which the Justices of the King's Bench were not unanimously agreed, the Judgment was reversed. And so this Case, as to the

(a) Antea 55. b; 10 Co. 61. 2. Dyer 80. pl. 58; 259. pl. 18; 11 Co. 4. 2. March. Rep. 41. Cr. Car. 279. 2 Rolls 154. Co. Lit. 3. b; Hob. 150, 151. 4 Inst. 202. 11 E. 4. 1. b; 3 H. 7. casu ultimo. 6 H. 7. 14. 2; 8 H. 7. 12. b. Br. Patent 52. 54; 57. Fitz. Grant 35. 42. Cr. Jac. 17, 18.

(b) 2 Rolls 198.

(c) Cr. Eliz. 971. 2 Ventris 197. Cr. Jac. 289. Palm. 499.

(d) 5 Co. 121. 2; 2 Bulst. 77, 78. Co. Lit. 303. 2.

(e) Cr. Jac. 17, 18.

* 10 Co. 105. 2.

(f) 2 Inst. 24, 25.

(g) 1 Bulst. 45. 2 Brownl. 229, 230.

Points reported by me, was unanimously resolved by both Courts: And afterwards, on a new Assise brought before *Warburton* and *Foster*, Justices of Assise in the County of *Derby*, at the next Assises, the Plaintiff had a general Verdict, according to the Opinion of all the Justices, and Judgment also at the same Assises, and Execution awarded, &c. *Et sic finita est ista Quæstio.*

Mich.

Mich. 6 Jacobi Regis.

BEECHER's *Case.*

Beecher brought Debt on two Bonds, one of 3000 *l.* the other of 2000 *l.* by *Quo minus* in the Exchequer, againſt Sir *Thomas Shirley*, Knight, who *Trin.* 41 *Eliz.* pleaded in Bar, Payment according to the Conditions of the Bonds, *&c.* and the Parties were at Iſſue, and tried for the Plaintiff; but for Default of a good Viſne, Judgment was arreſted, and afterwards, *ſcil. Hill.* 44 *Eliz.* the Plaintiff *per Johannem Oſborne, Attornatum ſuum, venit hic in Curia, & fatetur ſe in Curia hic ulterius nolle proſequi:* Upon which Judgment was given, that the Defendant *eat ſine Die*, and no Amercement upon the Plaintiff. Upon which Judgment the Plaintiff brought a Writ of *Error* in the Exchequer Chamber; and upon ſundry Arguments by the Plaintiff's and Defendant's Counſel, at ſeveral Days, It was reſolved by the Court, and the two Chief Juſtices, That the Judgment was erroneous, for divers Reaſons. 1. It was reſolved, That a (a) *Retraxit* cannot be, unleſs the Plaintiff or Defendant be in Court in proper Perſon, for the Entry is in divers Manners, (as it appears after) as, *Quod Querens in propria perſona ſua venit & dicit, quod ipſe placitum ſuum predict' ulterius proſequi non vult, ſed abinde omnino ſe retraxit, &c.* or being preſent in Court and demanded, where the Entry is (b) *a ſecta ſua predicta in contemptum Curiæ ſe retraxit*, &c. or, *fatetur ſe ulterius nolle proſequi, &c.* and therewith agrees (c) 3 *H.* 6, 14. *a.* 21 *E.* 3. 43. *a.* & 4 *E.* 3. 23. *a.* where the Caſe was, That three Coparceners were Plaintiffs in a Writ of *Deceit*, and two of them did appear in Perſon, and the third by Attorney; and ſaid, That they would not ſue further, and could not,

Cro. Jac. 211.

(a) 1 Roll. 584. Co. Lit. 138. b. 139. a. Cro. Jac. 211. Jenk. Cent. 283.

(b) Co. Lit. 139 a. Poſtea 62. a.

(c) Fitz. Retraxit 4.

not, because one was by Attorney; wherefore they were Nonsuit. *Vide Lib. Intrat* 92. *Title Attaint, Bre.* 5. and *Title Appeal*, 56. and *Title Tresp.* 589. *a.* 13, 14, 15, 16. and *Title Conspiracy*, 125. *b.* 6 *Ed.* 3. 30 *b.* and 31. *a. John Fremd's* Case, in a *Formedon*, the Attorney of the Tenant cannot depart in despight of the Court, but a *Grand Cape* shall be awarded.

(a) F.N.B. 25. C. Co. Lit. 128. a. 2 Inst. 249. 10 Co. 101. a. b. Cawly 164. 2 Inst. 377, 378.

And it is to be known, that at the (*a*) Com. Law, when any one was, by the King's Writ, commanded to appear, it was always taken that he should appear in Person, and could not appear by Attorney; but after he had appeared, the Courts of Chancery, King's-Bench, and Com. Pleas, and all other Judges who held Plea by Writ, might, after Appearance, have admitted him by Attorney: Otherwise when Plea was held without Writ, unless the King granted a Writ *De Attornato faciendo*, and that appears by *Britton*, *c.* 126. *f.* 287.

(b) W. 2. c. 10. 2 Inst. 376, 377, 378.

But *vide* the Stat. of *Westm.* 2. (*b*) *c.* 11. and other Statutes, which gave Remedy in many Cases; but the said Case at Bar is not remedied by any Statute. But it was objected, That it is true, that *de rigore Juris*, the Plaintiff in the Case at Bar ought to have appeared in proper Person; but yet it is not Error; for if the Court admits the Plaint. or Defen. by Attorney, where he ought to appear in Person, it is not Error; as in 37 *H.* 6. 27. *b.* If the Court admit one upon a *Capias*, or *Exigent*, by Attorney, where *de rigore Juris*, he ought to appear in Person, it is not (*c*) Error, (*d*) *F.N.B.* 25. *acc.* To that, it was answered and resolved, That there is a Difference between Cases where the Defendant or Tenant cannot by the Law appear by Attorney, and Cases where the Defen. or Ten. may appear by Attorney; but upon some Process, by reason of some Default or Contempt, he ought to appear in Person. In the first Case, If the Court admit the Defen. or Ten. by Attorney, it is Error; but in the other not: (*e*) As if an Infant is admitted to appear by Attorney, it is Error, *&c.* but when the Defendant may make an Attorney, and the Reason that compells him to appear in Person, is the Contempt to the Court; there the Court may dispence with the Contempt, in their Discretion, and admit him by Attorney, and that is no Prejudice to the Plaintiff: But in the Case at Bar, the Law requires him to appear in proper Person to make the *Retraxit*, because it shall be a perpetual (*f*) Bar, and in a Manner as a (*g*) Release, and the Admittance of the Court cannot prejudice the Plaintiff in so high a Degree. But in dilatory Matters, the Admission of the Court may turn the Plaintiff or Demandant to delay, but shall never Bar the Plaintiff or Demandant: As if the Court grants Process against the (*h*) Witnesses, or grants View, or (*i*) Aid, where it is not grantable

(c) Fitz. Attorney 20. Br. Attorney 56. Br. Error, 98.

(d) F.N.B. 25. c.

(e) 1 Roll. 287, 288, 795. 1 Roll. Rep. 305, 380. Cro. El. 377, 378, 424, 541, 542, 551, 569. Cro. Jac. 420, 441, 442, 581. Poph. 130. 2 Sand. 212, 213. 1 Sid. 449. 1 Mod. Rep. 47, 72, 296, 297. Styles 318. 3 Bulstr. 180. Bridgm. 73, 74, 75. Dyer 262. pl. 63. 9 Co. 30. b. Cr. El. 551. Palm. 228, 231, 233, 245, 252.

(f) 1 Roll. 584. Postea 62. a. Cro. Jac. 211. March. 95. Br. Departure in despite, &c. 13. 21 E. 4. 39. a.

(g) Cro. Car. 551. March 95. (*h*) 5 H. 7. 9. a. Fitz. Process 111. (*i*) 21 E. 4. 65.

grantable, it is not (*a*) Error, as it is held in 5 *H.* 7. 8. *b.* and 8 *H.* 7. 9. *b.* and the Reason is given there, because the Demandant has not any Prejudice of his Right, but only a Delay. But if the Court admit a (*b*) Voucher, where it ought not to be, it is Error, as it is held 8 *H.* 7. 11. *a.* The same Law if an * Essoign be cast and allowed where it is not allowable, it is not Error: But to deny any of these † dilatories, where of Right the Court ought to grant them, is Error, as appears in the said Books, and 21 *E.* 4. 65. *b.* 22 *E.* 4. 15. &c. And a (*c*) *Retraxit* is always on the Plaintiff or Demandant's Part, and a (*d*) Departure in despight of the Court, is always on the Defen. or Ten. Part, and the Entry there is, *Quod Tenens recessit in contemptum Curiæ*, and in one Case the Plaint. or Deman. is barred, and in the other Case the Plaint. or Deman. shall have Judgment presently; (*e*) *Qui semel Actionem renunciavit amplius repetere non potest. Vide* for these Matters, 29 *E.* 2. *Excommengement* 28. 4 *E.* 3. 23. *in Formedon.* 6 *E.* 3. 31, 32, 34. *a. in Quare Impedit.* 8 *E.* 3. 3. *b.* and 68. 38 *E.* 3. 13. 16 *R.* 2. *Tit. Cause de remover Plea* 12. 3 *H.* 4. 2. 11 *H.* 4. 94. 3 *H.* 6. 13. 9 *H.* 6. 58. 39 *H.* 6. 16, 33. *Prisot.* 7 *H.* 7. 39. *Vide Tit. Departure en despite del Court*, Brooke.

(*a*) 5 H. 7. 8. b. 9. a.
(*b*) Br. Error, 131.
* Hob. 87.
† 9 Co. 16. a.
(*c*) 1 Roll. 584. Co. Lit. 139. a.
(*d*) F.N.B. 78. F. Co. Lit. 139. a. 19 E. 2. Fitz. Villenage, 31.
(*e*) Co. Lit. 139. a.

2. It was resolved, That the Plaintiff in this Case ought to be (*f*) amerced, for it is a stronger Case than the Case of a Nonsuit, which is but a Default, or Non-appearance; but a *Retraxit* is a voluntary acknowledgment that he hath no Cause of Action, and theref. he will no farther proceed, &c. and theref. it is a Bar for ever. And it was objected, That the Plaintiff should not assign that for Error, because it was for his Advantage that he was not amerced, and a Man shall never assign that for Error which is for his (*g*) Advantage, 7 *E.* 3. 25. *b.* by *Herle*, 8 *H.* 5. 2. *b.* 11 *H.* 4. 8. *F. N. B.* 21. as to say, that he was essoigned, where he ought not to be essoigned; or that he had a longer Day than the common Day; or that Aid was granted to him where it was not grantable. To which it was answered and resolved, That it is true, that in Process, or Delay, which is for the Advantage of the Party, he shall not assign it for Error; but in the Case at Bar the Judgment is not * perfect, for the Amercement ought to be Parcel of the Judgment; and it is also for the King's Advantage, and therefore divers Judgments have been reversed in the King's Bench, because the Judgment was, *Ideo in* † *misericordia*, where it should be, *Capiatur*; and yet it was for the (*b*) Parties Advantage; but because the Judgment was erroneous, and the Error of the Court in giving it; for this Cause it hath been often adjudged, that it is not amendable, but the whole Judgment shall be reversed. *Vide* 29 *Ass. pl.* 26. 7 *E.* 6. *Dyer* (*i*) 89. 14 *El. Dyer* (*k*) 315. *vide* now the Doubts there well explained. And because it is so material

(*f*) Cr. Jac. 211. 1 Roll. 759. Jenk. Cent. 283.
(*g*) F.N.B. 21. f. 5 Co. 39. b. 7 Co. 4. b. Palm. 39, 40. 2 Sand. 46. 1 Roll. 757. 759, 760. Fitz. Error 92.
* 1 Roll. 769.
† 1 Roll. 769.
(*b*) Cro. El. 84. Cro. Jac. 211. Cro. Car. 505. 2 Sand. 47. 1 Roll. 759, 760. Jenk. Cent. 283.
(*i*) Dyer 89. pl. 111.
(*k*) Dy. 315. pl. 99. 1 Roll. 769. Moor 768.

material in all Judgments to know when the Plaint. or Demandant, and when the Defen. or Ten. ſhall be amerced or fined, inaſmuch as the miſtaking thereof makes the Judgment erroneous, it is very neceſſary to underſtand the true Senſe of the Law in theſe Caſes.

(a) Co. Lit. 126. b.

And this Word (a) *(Finis)* hath divers Significations in Law, *quia aliquando ſignificat Pretium, aliquando Pœnam, & aliquando Pacem.* For 1. the Price, or Sum, which is the Cauſe of obtaining of a Benefit, is called a Fine, as Fine in the Hamper for the King's Writs, Fine for Alienation, Fine for Admiſſion to a Copyhold, Fine for obtaining Leaſes, and ſuch like. 2. That which the Offender gives in Satisfaction of his Offence, is alſo called a Fine, and in that Senſe, *dicitur Pœna.* And 3. The Aſſurance which makes Men enjoy their Lands and Inheritances in Peace, is called *Finis, quia finem litibus ponit.* And all theſe are called Fines, becauſe they are the End, or Cauſes of the End of all the ſaid Buſineſſes.

(b) Co. Lit. 126. b. 8 Co. 39. a.

(b) *Amercement* is in *Latin* called *Miſericordia*, and the Cauſe thereof is, becauſe by the Com. Law (which is a Law of Mercy) no Man ought to be amerced ſo much as he deſerves, but leſs. *Vide F. N. B. 76.*

1. In Force.

1. In all Actions *Quare vi & armis*, as *Reſcous*, *Treſp. vi & armis*, &c. if Judgm. be given againſt the Defen. he ſhall be fined and impriſoned, for to every Fine (c) Impriſonment is incident; and always when the Judgm. is, *quod Defendens capiatur*, it is as much as to ſay, *quod Capiatur quouſque finem fecerit. Vide* 19. *H.* 6. 8. *b.* 34 *H.* 6. 24. 11 *H.* 4. 25. 30 *Aſſ. pl.* 28. And if there be divers Defendants, they ſhall be ſeverally fined. So in an *Aſſiſe*, if the Diſſeiſin be found with Force, the Defendant ſhall be fined, and impriſoned; otherwiſe it is if the Diſſeiſin be found without Force; for there he ſhall only be amerced, for the Writ of *Aſſiſe* doth not mention *vi & armis*, but, *injuſte & ſine judicio diſſeiſivit*, 33 *H.* 6. 21. *a.*

(c) Co. Lit. 126. b.

2. Fraud and Deceit to the Court.

2. In a Writ of *Deceit* upon a real Action upon a Recovery by Default, if it be found on Examination, that the Ten. was not lawfully ſummoned, the Judgm. ſhall be, *Et prædict' Defend' pro falſitate & deceptione prædict' capiatur*: And the Writ of *Deceit* is, *Oſtenſum eſt nobis ex parte A. quod B. in Curia noſtra falſo & in deceptione Curiæ recuperavit ſeiſinam*, &c. and that is the Cauſe, *ſcilicet*, the Deceit to the Court in obtaining the ſaid Judgment, that he ſhall be fined and impriſoned; but in an Action perſonal, the Deceit between Party and Party, which is in the Nature of an Action upon the Caſe, there the Defendant ſhall not be fined and impriſoned, but only amerced, for there is no Deceit done to the Court, but to the Party.

3. If

3. If the Defendant, or Tenant, pleads a false Deed to him, or (a) denies his own Deed, and it is found against him, or if he, (b) *relicta verificatione cognoscit Actionem*, he shall be fined for his Falsitie, *quia certi debemus esse de proprio facto*; but if he denies his (c) Ancestor's Deed, or pleads a Deed to his Ancestor, and it is found against him, yet he shall not be fined, but amerced only, *quia de alieno facto*. And so you will better understand your Books in 3 *E.* 6. *Dy.* 67. 26 *Ass. p.* 5. 33 *H.* 6. 54. *b.* 34 *H.* 6. 20. *a. b.* But if he denies a Recovery, or other Record to which he is Party, he shall not be fined, 10 *Ass. p.* 10. 16 *Ass. p.* 19. for it is not his Act, but the Act of the Court, and he doth not deny the Record absolutely, but, *non habetur tale recordum*.

3. Falshood in denying his own Deed.

(a) 1 Roll. 219, 224. 33 H. 6. 54. b. Br. Amercem. 5. Br. Confession 3. Br. Fine pur Contempt 3. Fitz. Fines 16, 9 E. 4. 24. a. b. Fitz. Fines 25. Dy. 67. pl. 19. Cro. El. 844, 845. Cro. Jac. 64, 420. Kelw. 42. a. (b) 1 Roll. 224. 33 H. 6. 54. b.

2 Roll. Rep. 45. Fitz. Fines 16. 9 E. 4. 24. a. b. Fitz. Fines 25. Dy. 67. pl. 19. Noy 64, 420. 2 Sand. 191. Raym. 195, 202. 1 Mod. Rep. 73. (c) Br. Amercement 5. Cro. Jac. 255. 2 Sand. 192.

4. If the Defen. in a *Replevin* claims Property falsly, and it is so found in (d) *proprietate probanda*, he shall be fined and Imprisoned, 11 *H.* 4. 4.

4. False claim of Property of Cattle, &c. in voluntary delay of Justice, so that he can't have the Use of the Cattle of his Plough, or other Goods. (d) 11. H. 4. 4. b. 5. a. Br. Fine pur Contempt 14. Br. Retorn de Brief 108. Fitz. Proprietate probanda 1. Br. Propr' prob. 14.

5. In (e) *Appeal* of Death, Robbery, or any other Appeal of Felony or Mayhem, if the Plaintiff be barred, or if he be * Non-suit, or if the Writ abate by his own Default, he shall be fined and imprisoned, 8 *H.* 4. 17, *a.* 20. for the Malice is the highest which concerns Life or Member.

5. For malicious Suit in Law, which concerns a Man's Life. (e) Fitz. Corone 73. Br. Appeal 23. Br. Fine pur Contempt 11. Br. Impris. 166. * Co. Lit. 127. a.

6. So in Attaint 32 *Ass. p.* 9. 42 *E.* 3. 26. *b.* if the Plaint. be Nonsuit, or barred, he shall be fined and imprisoned. So if the *Attaint* pass against the Defen. if he were Party to the first Record, he shall be fined and impris. but if he were not Party to the first Record, as Ten. by Receit, or other Ter-tenant, he shall not be fined, 14 *Ass. p.* 2. 42 *E.* 3. 26. *b.* 9 *E.* 4. 33

6. Malicious Suit in Law to attaint a Jury of Perjury.

7. Where any uses the Countenance of the Law (which was instituted to make an End of Controversies and Vexation) for double Vexation, he shall be fined: As if a Man (f) sues in the C. Pleas, and afterwards, for the same Cause, sues him in *Lond.* or any such Court, the Plaint. shall be fined for this unjust Vexation, 9 *H.* 6. 55. 14 *H.* 7. 7. *a.* and in a (g) *Recaption* the Plaintiff shall recover Damages, and the Defen. shall be fined and imprisoned for his double Vexation.

7. For doub. Vexation by colour of Law. (f) Br. Fine pur Contempt 24. 7. H. 6. 36. b. (g) 11 Co. 43. b. Antea 41. a. F. N. B. 73. d.

8. For all Contempts done to any Court of Record, against the K's Command by his Writ under his G. Seal, the Offender shall be fined and impris. as in *Quare non admisit*, *Quare incumbravit*, *Attachment upon Prohibition*, &c. *Vide* 19 *E.* 3. *Quare non admisit*, 7. 23 *E.* 3. 22. 26 *E.* 3. 75. 20 *E.* 2. *Coron.* 233. *Stampf.* 132. *The Stat. of* 25 *E.* 3. *c.* 6. &c. but when the Demandant, or Plaintiff, or the Tenant or Defen. *se retraxit*, or *recessit in contemptum Curiæ*, yet there is no Contempt

8. Contempts against the King's Writs.

against the King's Command by his Writ. And by these Differen. you will better understand your Books in Cases of Fines and Imprisonm. and learn the true Reas. and Sense of the Law.

9. Contempt against a Statute.

9. In all Cases, where a Thing is forbid by any (a) Statute, the Offender shall be fined and imprisoned, 35 *H.* 6. 6. *b.* 19 *H.* 6. 4. in *Maintenance*. *Vide* 9 *E.* 4. 28. And that is the Reason, That where the Statute of *Marlebridge c.* 15. forbids, *Quod nulli de cætero liceat ex quacunque causa district' facere extra feodum suum, nec in Regia via, vel communi Strata*; that the Party who is distreined in the High-way cannot plead it in Bar of the (b) Avowrie, for then the King should lose his Fine; but shall be driven to an Action on the Statute, in which the King shall have his Fine, and therewith agreeth 11 *R.* 2. *Avowry*, 87. *Vide* 19 *E.* 2. *Brief*. 842. 21 *E.* 3. 11. 39 *E.* 3. 20. 43 *E* 3. 30. *F. N. B.* 90, & 173. *Register* 97.

(a) 2 Inst. 131. Cro. Jac. 538. Cro. Car. 560. 4 Bulstr. 328. 1 Sid. 239. 42 Co. 134. 2 Roll. 222.

(b) 2 Inst. 131.

10. A Court which is not of Record shall never impose a Fine.

10. In some Action the Defendant shall be fin'd in one Court, and but amerced in another Court, and yet the Offence shall be all one; as in a Writ of (c) *Recaption*, if it be brought in the Common Pleas, and Judgment be there given, the Defendant shall be fined and imprisoned as hath been said, but if the Writ be brought in the County Court, and the Defendant be convict before the Sheriff in the County, the Judgment shall not be, *Quod capiatur, quia nulla Curia, quæ (d) recordum non habet, potest imponere finem, neque alig mandare carceri, quia ista spectant tantummodo ad Curias de Recordo*, and therefore in such Case he shall be only amerced. And altho' the Writ *scil.* the Recaption is of Record, yet forasmuch as the Judges in the Court, *scil.* the Suitors are not Judges of Record, nor the Court is of (e) Record, they cannot impose a Fine, or commit any to Prison. And so in all the like Cases. *Vide F. N. B.* 73. *d.* 8 *E.* 4. 5. 34 *H.* 6. 24.

(c) 11 Co. 43. b. Postea 120. a. F. N. B. 73. d. Antea 41. a.

(d) Co. 10. 103. a. Postea 120. a. Antea 41. a. Salk. 200.

(e) 6 Co. 11 b. Co. Lit. 58. a. Godb. 49. 1 Roll. 543. 4 Co. 33. b. Cr. El. 792. Cr. Jac. 582. 4 Inst. 266, 268. 21 E. 4. 66. b. 9 Co. 48. b. 49. a. 1 Mod. Rep. 171. 12 H. 7. 16, 17. 7 E. 4. 23. a.

Amercement.

1. In all Writs of Præcipe quod { reddat / permittat / faciat.

And now concerning Amercement.

1. In all Writs of *Præcipe quod reddat*, as Writ of Right, Formedon, or Writ of Aiel, *&c.* Writs of Entry, *&c.* *Præcipe de quod permittat*, as to have Estovers, Common, *&c.* Or, *Præcipe quod faciat*, as Writ of Customs and Services, *&c.* If the Defendant be barred, or if he be Nonsuit, or if his Writ abate because it is ill in Matter or Form, the Demandant shall be amerced. But if there be two Demandants, and the Writ abate for the Death of one of them, the other shall not be amerced, 28 *E.* 3. 23. *a.* 46 *E.* 3. *Tit. Accompt* 40. 5 *E.* 3. 3. 22 *H.* 6. 7. 38 *E.* 3. 31. 7 *H.* 6. 36. 41 *Ass.* 14. So in all the said Writs of *Præcipe*, if Judgment be given against the Tenant, he shall be amerced.

On Nonsuit, Bar, or Writ abated for Want of Matter or Form, the King shall have Amerciament. Writ abated by Act of God, &c. no Amerciament. Fitz Amerciament 13. Br. Amerciament 12. Co. Lit. 127. a.

2. In

2. In all Personal Actions, as Debt, Detinue, and the like Actions, without Force or Deceit to the Court, and also in Actions which comprehend Force or Deceit to a Court of Record; if the Plaintiff be barred, nonsuit, or the Writ abate because it is vicious in Matter, or Form, he shall be amerced only, and not fined; but if the Writ abate by the Death of one Plaintiff, or if one Plaintiff appeareth, and the other be (*a*) nonsuit, (which in Law in Personal Actions is a Nonsuit of both) he who surviveth, or appeareth, shall not be amerced; for no Default is in him, but he only who appeareth not. 47 *E.* 3. 6. *b.* & 43 *Ass. pl.* 3. 7 *H.* 6. 36. 38 *E.* 3. 31. 41 *Ass.* 14. And in the same Actions which are without Force or Fraud to the Court, the Defendant shall be amerc'd.

2. In Pers. Actions.

Death or Nonsuit of one of the Plaintiffs.

(*a*) Co. Lit. 127. a. Br. Amercement 11 Fitz Amerc. 11.

3. If one Demandant in a (*b*) Real Action, or one Plaintiff in a Personal Action where (*c*) Summons and Severance lieth, as in Debt by Executors, if one Demandant or Plaintiff be nonsuit, and the other sueth forward, he who is nonsuit shall not be amerced, 28 *H.* 6. 11. *b.* 21 *E.* 4. 77. *b.*

3. One Demandant or Plaintiff nonsuited.

(*b*) Br. Amer. 2. (*c*) Br. Am. 48.

4. In all judicial Process, if the Plaintiff be barred, nonsu. or if the Writ abate, the Plaintiff shall not be amerced, because the Process is founded upon a Judgment and Record, 11 *H.* 4. 55. *b.* in (*d*) *Quid Juris clamat, Scire facias, &c.* 21 *E.* 3. 23. 9 *E.* 3. 32. in *Per quæ servicia*, 18 *Hen.* 6. *tit. Pledges* 1. And in these Actions the Plaintiff shall not find (*e*) Sureties, because he shall not be amerced.

4. In judicial Process no Amercement.

(*d*) 11 H. 4. 7. 2. Br. Amercement 16. (*e*) F. N. B. 31. C. Cro. Jac. 414.

5. In all Actions Real and Personal, if Part be found for the Demandant or Plaintiff, and Part against him, or all or Part against one Tenant or Defendant, and nothing, or but Part, against the other, the Demandant or Plaintiff shall be (*f*) amerced; unless no Default be in the Demandant or Plaintiff, and therefore in Trespass of Battery against Husband and Wife, supposing the Battery to be done by them both, and the Wife is only found guilty, *&c.* and the Husband acquitted, yet the Plaintiff shall not be amerced, for the Plaintiff could not have another Writ in such Case, and therefore no Default in him. *Vide* 22 *Ass.* 8. 7 *Ass. pl.* 14. 31 *Ass. pl.* 31. *Br. Amercement* 42. 40 *E.* 3. 40. *a.* 21 *H.* 6. 41. *a.*

5. Part found for the Demandant or Plaintiff, &c. and where Part against one Tenant or Def. &c.

(*f*) Cro. Jac. 630. 1 Roll. 787. Cro Car. 178. 453. Cro. El. 257. 1 Sid. 232. Br. Amercement 2, 7, 29. Br. Executors 76.

6. In all Acti. Real or Pers. where there is but one Tenant or Def. he shall not be twice amer. but there where there is but one Demandant or Plaintiff, and divers Defendants, the Plaintiff may be divers Times (*g*) amerced, 9 *E.* 3. 6. 31 *Ass. pl.* 31. 21 *H.* 6. 41. *a.* 40 *E.* 3. 40. *a.*

6. One Ten. or Def. shall not be twice amerced.

(*g*) 5 Co. 58. b. Cro. Car. 178.

7. Upon Discon. in a Real or Pers. Acti. the Dem. or Plaintiff shall not be amerced, for that is the Act of the Court, 38 *E.* 3.

7. On Discontinuance, or when the Court is ousted of Jurisdiction, no Amerc.

E. 3. 31. *a.* The same Law, and for the same Cause, when the Court is ousted of Jurisdiction.

8.

Tenant or Def. comes the first Day, &c. shall not be amerced unless the Action imports Force or Fraud.

(*a*) Cro. Car. 564. Co. Lit. 126. b 1 Roll. 212. 8 R. 2. Amercement 26. Cro. El. 65. 14 E. 3. Amercement 16.

(*b*) Jenk. Cent. 258. Moor 394.

8. In all Actions Real or Pers. (in which there is not contain'd any Force or Deceit to the Court) if the Ten. or Def. comes the first (*a*) Day, and rend. the Thing in Demand to the Dem. or Plain. he shall not be amerced; for he doth what the King commands by his Writ; for where the Writ is, *Præcipe quod reddat, &c.* that in Judgment of Law is, that he render it at the Return of the Writ in Court, and not in the Country, as it is resolv'd in (*b*) *Vaughan's* Case, in the Fifth Part of my *Rep. fol.* 49. *a.* and there the Cause of the Amercem. of the Ten. or Def. is well explain'd. But in Actions in which the Offence is supposed with Force, or in Deceit of the Court, if the Def. at the first Day confesses the Action, yet he shall be fined and impris. for his Appearance and Confession are a Manifestation, and no Satisfaction for his Offence.

9.

The Judgment when the Writ abates by Matter or Form, or when the Demand. is barr'd.

9. In all Cases when a Real or Personal Writ doth abate for want of Form or Matter, or the Dem. or Plain. be barred, the Judgment is, *Quod Petens, sive Querens nihil cap. per breve suum præd' sed sit in Misericord' pro falso clamore suo inde, & præd' Ten' seu Def' eat inde sine die.* And in all such Cases the Estreat out of the Common Pleas into the Exchequer, which the Clerk of the Warrants makes in such Cases is, *De A. pro falso clamore suo versus S. in placito, &c. Vide F. N. B. 76. A.* But if the Dem. or Plain. be * nonsuit in any Action (certain special Cases excepted) the Judgment is, *Ideo consideratum est quod præd' (c) Querens & Plegii sui de prosequendo sint inde in misericordia, &c. & præd' Def. eat inde sine die*; and there the Estreat is, *De Johanne N. pro se & pleg. suis, quia non est prosequutus breve suum versus B. in placito, &c. Vide (d) F. N. B.* 76. † But in Case of *Retraxit* the Judgment is, *Quod nihil cap' per breve suum præd', sed sit in misericor' pro fals' clam', &c.*

* The Judgment on a Nonsuit.

(*c*) Cr. Jac. 713.

(*d*) F. N. B. 76. a.

† The Judgment in a Retraxit.

10.

Persons who shall not be amerced.

(*e*) Co. Lit. 127. a. 133. a. Cr. Car. 161. Cr. Jac. 414. 3 Bulst. 276. 1 Roll. 214. Palm. 518, 519, 520.

(*f*) Co. Lit. 127. a. 3 Bulst. 276. 1 Roll. 215.

(*g*) Co. Lit. 126, 127. a. Cr. Car. 161, 410. 3 Bulst. 276. b.

10. There are some Persons who shall not be amerced, and therefore they shall not find (*e*) Sureties; some for the Dignity of their Persons, as the King, (*f*) and so the Queen, for as to that she partakes of the King's Prerogative. *Vide F. N. B.* 31. *f.* 47. *C.* 101. *A.* 18 *E.* 3. 2. *Br. tit. Amercement* 53. Some for Imbecility of Age, as (*g*) Infants, and therefore they shall not find Sureties; but the Entry is, *Ideo in Misericord', sed pardonatur quia Infans. Vide* 43 *Ass.* 45. 4 *E.* 3. *Tit. Amerce.* 10. 3 *E.* 3. *Infant* 14. 14 *Ass. pl.* 17. 41 *Ass. p.* 14. 17 *E.* 3. 75. *Bract. folio* 254. *F. N. B.* 195. *b.*

3. True it is, if the Ten. (*h*) discla. he shall not have a Writ of Err. against his own Disclai. because by his Disclai. he hath barred

Reg. Orig. 224. a. 1 Roll. 214, 215. Palm. 518, 519, 520. Mo. 394. 1 Mod. Rep. 47. 296. Dyer 338. Pl. 41. 2 Keb. 698. 1 Bulstr. 172. 5 Co. 49. a. (*b*) Cr. Jac. 548. 2 Roll. Rep. 128. Fitz. Err. 78. postea 62. a. Jenk. Cent. 283.

barred himself of the Right of the Land, for the Words of Disclaimer of the Tenant are, *Nihil habet, nec habere clamat, in terra illa, nec die Impetrationis brevis originalis prædt' &c. habuit, sive clamavit, sed aliquid in terra illa habere dedvocat & disclamat*; And against that he cannot have a Writ of (a) Error to have Restitution of the Land against this Disclaimer. *Vide 6 Edw. 3. 7. b. & F. N. B. 22. C.* And if the *Retraxit* in the Case at Bar had been duly made, it was objected, That against it no Writ of Error lay; but here the *Retraxit* itself was erroneous; because the Attorney did it where it ought to be done in (b) proper Person. Also the Plea was discontinu'd, as appears by the Record. And forasmuch as the Ten. or Def. after Departure in Despight of the Court might have a Writ of Error, or if he had an Estate for Life or in Tail, *Quod ei deforceat, F. N. B. 155. I.* and the Defendant or Tenant against his own (c) Confession may have a Writ of Error; It was resolv'd, That altho' the Plaintiff in proper Person had made a *Retraxit*, yet he might have a Writ of (d) Error, either in the Judgment or in the Proceeding; for no Imperfection is sav'd in such Case by any Statute when Judgment is given upon *Retraxit*, and it is no more than a Confession on the Part of the Defendant; for the Effect of the Entry of a *Retraxit* is, *Quod idem (e) Querens fatetur (seu cognovit) se ulterius nolle prosequi versus Def. de placito prædt'*, which Confession is (f) a Bar in all Actions, although the Words are *de placito suo prædicto*, and therefore it is not like a Disclaimer, by which the Tenant disclaims and bars himself absolutely of all his Right in the Land.

(a) Cro. Jac. 548. 2 Roll. Rep. 188. Fitz Err. 78. Antea 61. b. Jenk. Cent. 283.

(b) Antea 58. 2. 1 Roll. 584. Co. Lit. 138. b. 139. a. Cro. Jac. 211. Jenk. Cent. 283.

(c) F. N. B. 21. k.

(d) Antea 59. a.

(e) Co. Lit. 139. a.

(f) Antea 58. b. 1 Roll. 584. Co. Lit. 139. a. Cro. Jac. 211. March 95. Br. Departure in Despight, &c. 13. 21 E. 4. 39. a.

4. It was resolv'd; That the Entry of the said *Retraxit* was insufficient; for it appears by the Precedents that there are sundry Manners of Entries of a *Retraxit:* After both Parties have appeared in Court, the Entry is, *Et (g) postea eodem die venit hic ad barram prædt' Tenens per Attorn' suum prædt' & prædt' Petens tunc solemniter exactus non venit, sed a secta sua prædt' in contempt' Cur' se retraxit, Ideo consideratum est quod Tenens nihil capiat per breve suum prædt' sed sit in misericordia pro falso clamore suo inde, & quod prædictus Tenens eat inde sine die.* And that appears, *Trin. 5. H. 6. Rot. 320. in Com' Banco.* Another Form of a *Retraxit* is, *Et super hoc idem Quer' dicit, quod (h) ipse non vult ulterius placitum suum prædt' prosequi, sed inde omnino se retraxit*, &c. *Ideo*, &c. Another Form is, *Quod idem (i) Querens fatetur se (seu cognovit se) ulterius nolle prosequi versus prædt' Defendent'* &c. *de placito prædt'*. And the Entry of Departure in Despight of the Court on the Part of the Tenant is, (k) *Et prædictus A. licet solemniter exactus non venit, sed in contempt' Cur' recessit & defalt' fecit.* And that is when in Judgment of Law he is present in Court, and being demanded

(g) Co. Lit. 139. a.

(h) Antea 58. 2. Co. Lit. 139. a.

(i) Co. Lit. 139. a.

(k) Co. Lit. 139. a.

demanded, departs in Deſpight of the Court, that amounts to a Bar, in reſpect of the Deſpight and Contempt of the Court; and yet the Judgment is there given upon his Default, as appears before. Otherwiſe where he imparles to a certain Day, for there he is not, in Judgment of Law, preſent in Court; and ſo the Difference. *Vide* 20 *Ed.* 2. *Excom.* 28. and all the Books aforeſaid. And if the Writ abates for falſe *Latin*, or other Matter of Form, upon Plea to the Writ, the Judgment is, *Quod præd' Tenens*, or *Defendens, eat inde ſine die.* And alſo if the Demandant, or Plaintiff, be upon a Bar pleaded, *&c.* by Judgment to be barred, the Words of the Judgment are all one, *ſcil. quod præd' Tenens*, or *Defendens, eat inde ſine die*; and always the Judgment ſhall have relation to the Plea, *ſcil.* if upon a Plea in Bar, then the Judgment ſhall be applied to it: If to the Writ, then the Judgment ſhall be applied to the Writ only, and not in Bar; and therewith agree the Books in 3 *H.* 4. 1. and 3 *H.* 4. 11. *Vide* upon Plea of Excom. which doth not (a) abate the Writ, 11 *R.* 2. *Excom.* 25. the Entry is, *Remaneat loquela ſine die quouſque*, &c.

(a) Poſtea 69. a. Lit. Sect. 201. Co. Lit. 134. b.

Mich. 6 Jacobi *Regis.*

SWAYNE's *Case.*

Richard Swayne, Eſq; brought an Action of Treſpaſs againſt *Walter Becket*, *quare Clauſum fregit*, at *Hanningon* in the County of *Wilts*, and lopped, *&c.* 10 Oaks, and 5 Aſhes, *&c.* And upon not Guilty, the Caſe, as it was ſpecially found, was ſuch; Q. *Elizabeth* was ſeiſed of the Manor of *Hannington* in the County of *Wilts*, in Fee, in the Right of her Dutchy of *Lancaſter*; and that the ſaid Oaks and Aſhes ſo lopped, were growing upon a Yard and half of Land, Parcel of the ſame Manor and Copyhold Land, *&c.* and demiſable for one, two, or three Lives; and afterwards the Queen, by Indenture under the Seal of the Dutchy of *Lancaſter*, *Anno* 29 *Regni ſui*, demiſed the ſame Manor to *John Wolly*, Eſq; *exceptis omnibus boſcis, ſubboſcis, arboribus, & marem*, &c. To have and to hold to him (except before excepted) for 21 Years; who, 35 *Eliz.* aſſigned all his Intereſt to *John Plummer*, and others; and afterwards the Queen died; and afterwards the King that now is, by his Letters Patents under the Dutchy Seal, granted to *Alexander*, Lord *Fivy*, *Richard Swayne*, and *Peter Whetcombe*, *reverſionem prædict' ac præmiſſa ſic, ut præfertur, except'*, to them and their Heirs, to whom the Leſſees attorn'd; and afterwards the Lord *Fivy*, and *Whetcombe*, by their Deed releaſed to *Richard Swayne*, and his Heirs: And at a Court held by the Leſſees, 17 *Octob.* 3 *Jac. Regis*, their Steward granted, by Copy of Court Roll, to the ſaid *Walter Becket*, now Defendant, *&c.* a Houſe, and the ſaid Yard and a half of Land upon which the ſaid Oaks and Aſhes were growing, for term of Life, *ſecundum conſuetudinem Manerii*; and that within the ſaid Manor there has been ſuch a Cuſtom, That every Copyhold-Tenant for Life hath uſed to take all Trees growing upon his Copyhold-Lands, to be employed for Fewel in his Copyhold-Houſe, and for Bounds and Fences, and other neceſſary Reparations to be in and upon

812.
1 Brownl. 231.
2 Brownl. 208.
1 Roll. Rep. 96.
2 Roll. Rep. 179. 11 Co. 50. b.

upon the Customary Lands and Tenements; and that the Defen. did lop the said Trees upon his Copyhold, and imploy'd them for Bounds and Fences in and upon his Copyhold Lands and Tenem. *&c.* And the Doubt was, That forasmuch as the said Lessees held the Court by virtue of the said Lease of the Manor (out of which Lease the said Trees were excepted) if the Defen. to whom they, by their Steward, granted the said Tenem. by Copy, might lop the said Trees, which, by the said Exception, were divided from the said Lease. And in this Case divers Points were resolved by *Coke* C. J. *Walmsley*, *Warburton*, *Daniel* and *Foster*, as after appears. But first it was objected, *Quod* (*a*) *nemo potest plus juris in alium transferre quam ipse habet*; and the Lords *pro tempore* who held the Court, and made the Grant to the Def. had nothing in the Trees, for they were excepted out of their Lease; *Ergo*, the Copyholder who claims by Grant of the Lessees could not meddle with the Trees. But it was answered and resolved *per totam Curiam*, that notwithstanding the Severance by the (*b*) Exception, and notwithstan. the Defen. came in by a voluntary Grant of the Lords for Life, and not by Surrender, yet such Grantee by Copy, should have Estovers; for the Estate of the Copyholder (who comes in by voluntary Grant) is not derived out of the Estate or Interest of the L. of the Manor, for the L. of the Manor is but as an (*c*) Instrum. to make the Grant: But the Custom of the Manor (after the Grant made) establishes and makes it firm to the Grantee: So that altho' the Grant be new, yet the Title of the Copyholder is ancient, and so ancient, that by Force of Custom it exceeds the Memory of Man. And theref. neither for Infancy, *Non sanæ memoriæ*, Coverture, nor other such Disabilities, neither in respect of Exility, Baseness, or (*d*) Incertainty of the Interests or Estates of the Lords (as at Will, or upon Condition, *&c.*) the Grants by Copy shall not be avoided, because they claim in, by Force of a good and ancient Custom, which hath no Disability of Person, or Defect of a perfect Interest. And *Pasch.* 26 *El. in Banco Regis* it was adjudg'd, That if the L. takes a Wife, and afterw. grants the Land by Copy, according to the Custom, and dies, his Wife being (*e*) endowed of the said Land amongst other, shall not avoid the Estate by Copy, for altho' her Title of Dower was before the Grant, yet the Title of the Copyholder, which is the Custom, is ancienter than the Title of Dower; and so the Copyholder, who comes in by voluntary Grant, shall not be subject to the Charges or Incumbran. of the Lord before the Grant. And all that, in this Case was affirmed for good Law *per totam Curiam.* 2. It was resolv'd, That when the Copyholders * for Life, according to the Custom, have used to have Com. in the (*f*) Wastes of the Lord of the Manor, or Estovers in his Woods, or any other Profit *apprender* in any Part of the Manor, and afterw. the L. aliens the Wastes, or Woods, to anoth. in Fee and

(*a*) 4 Co. 24. b. 5 Co. 113. a. 6 Co. 57. b. 68. b. Co. Lit. 309. b.

(*b*) Moor 812. 2 Brownl. 231. 22 Co. 50. b.

(*c*) 4 Co. 27. b. Co. Lit. 59. b. 2 Roll. 503. Cro. El. 361. Bridgm. 51. Moor 112.

(*d*) 1 Roll. 499. 4 Co. 23. b. Co. Lit. 58. b. Cr. Jac. 98, 99.

(*e*) Mo. 758. 812. 2 Brownl. 208. Bridgm. 51. 1 Leon. 16. 2 Siderf. 82.

* Doct. pla. 81.

(*f*) 1 Brownl. 231.

and afterw. grants certain Copyhold-Houſes and Lands for Lives, ſuch Grantees ſhall have Com. of Paſture, or Com. of Eſtovers, *&c.* notwithſtanding the Severance, for the Title of the Copyholder is paramount the Severance; and the Cuſtom unites the Common, or Eſtovers, which are but Acceſſaries, or Incidents, as long as the Houſe and Lands, being Principal, is maintained by the Cuſtom, which cuſtomary Appurtenances are not appertaining to the Eſtate of the Lord, for he is the Owner of the Freehold and Inheritance of all the Manor, but they are appertaining to the cuſtomary Eſtate of the Copyholder, after the Grant made unto him; which Profit apprender being due by Cuſtom to the Copyhold Tenement, notwithſtanding the Feoffm. or Fine, *&c.* of the Waſt or Woods, made by the Lord, remains and is preſerved by the Cuſtom, which is, as hath been ſaid, the Title of the Copyholder, and is paramount the Severance: But if the Copyholder had derived his Intereſt from the Eſtate of the Lord, then clearly by the Feoffm. or Fine, *&c.* of the L. all thoſe who after claim by him, ſhall be barred of any Profit apprender in the ſame Waſt or Woods: *Vide* (*a*) *Murrel*'s Caſe, in the fourth Part of my Reports, that after the Cuſtom hath fixed a cuſtomary Intereſt, no Severance of the Inheritance ſhall overthrow the Copyhold: And *vide* (*b*) *Brown*'s Caſe, *ibid.* And if a Man grants a Rent to another out of his Land, on Condition, and afterwards makes a Feoffm. of the Land, yet the Condition to determine the Rent remains, and is not extinct by the Feoffm. for it is collateral to the Title of the Land. And note a Difference between (*c*) Preſcription which is made in the Perſon of any, as he and all his Anceſtors, *&c.* or all thoſe whoſe Eſtate he hath, *&c.* and Cuſtom which lies upon the Land, as *infra Manerium talis habetur Conſuetudo*, &c. and this Cuſtom binds the Land, as *Gavelkind*, *Borough-Engliſh*, and the like. (*d*) But after ſuch Severance of the Waſt, or Woods, *&c.* the Copyholder, when he entitles himſelf to Common, or Eſtovers, *&c.* in pleading, ſhall not plead generally, *quod infra Manerium prædict' talis habetur*, &c. *Conſuetudo*, &c. for after the Severance, the Waſt or Wood, &c. is not within the Manor, but abſolutely divided from it; but (*e*) ſhall plead that until ſuch a Time, viz. before the Severance, *talis habebatur, & toto tempore*, &c. *Conſuetudo*, &c. and then ſhew the Severance, as he ought in the ſaid Caſe of *Murrell*, where the Lord of the Manor alienes the Freehold and Inheritance of the Copyhold. *Vide* 9 *H.* 6. 9. 11 *H.* 6. 23. 39 *H.* 6. 13, 14. 7 *E.* 4. 32. 20 *E.* 4. 1. b. 22 *E.* 4. 44. And *Coke* C. J. ſaid, That the ſaid Caſe at Bar was a general Caſe, for in all (*f*) Leaſes of Manors made by Q. *Eliz.* or the King that now is, ſuch Exception of Trees and Timber, &c. is. And Judgment was given for the (*g*) Defendant.

(*a*) 4 Co. 21. b. Cr. El. 252. 2 Leon. 209.

(*b*) 4 Co. 21. a. Moor 125.

(*c*) 6 Co. 60. b. Co. Lit. 113. b. 4 Co. 32. a.

(*d*) Doct. Pla. 81

(*e*) Doct. Pla. 81

(*f*) 11 Co. 50 b.

(*g*) Moor 812.

Mich.

Mich. 6 Jacobi *Regis*.

Sir WILLIAM FOSTER's *Case*.

1 Brownl. 169, 170.

IN a *Replevin* between *Barnard Cowper* Plaintiff, and Sir *William Foſter* Defendant, for taking his Cattle, *ultimo die Auguſti anno quarto Jacobi Regis, apud Stratfield, in Com' Berks, in quodam loco vocat'* the *Rye-piddle*, the ſaid Sir *William* avow'd the taking, as Baily of *Ed. Gregory*, Eſq; and *Mary* his Wife, Adminiſtratrix of the Goods and Chattels which were *Tho. Foſter*'s, Gent. and ſaid, That the Place where contain'd three Acres of Land, Parcel of the Manor of *Bechilwick* in the ſaid County, whereof *Charles Foſter*, Eſq; was ſeiſed in Fee, and 30 *Jan. Anno* 4 *Ed.* 6. by his Deed indented, enfeoff'd of the ſaid Manor *Richard Puttenham*, to him and his Heirs, yielding therefore yearly to the ſaid *Charles*, his Heirs and Aſſigns, 6*l.* 13*s.* 4*d.* at the Feaſt of St. *Michael*, and the *Annunciation* of our Lady, by equal Portions, with Clauſe of Diſtreſs; and afterwards the ſaid *Charles Foſter* died ſeiſed of the ſaid Rent, after whoſe Death it deſcended to the ſaid *Thomas Foſter*, as to his Son and Heir; and afterwards, *ſcil.* 10 *Julii, anno* 25. he died inteſtate, and becauſe 100*l.* of the Rent aforeſaid was behind, for 15 Years ended 10 *Ed.* he avowed the taking, as Bailiff to the ſaid Huſband and Wife, Adminiſtratrix of the ſaid *Thomas Foſter*. The Plaintiff, in bar of his Avowry, pleaded, *Quod* (*a*) *nec prædictus Tho. Foſter nec anteceſſores ſui, nec aliqui alii quorum ſtatum præd' Tho. Foſter habuit in reddit. præd' unquam fuerunt ſeiſiti de eodem redditu infra* 40 *annos jam ultimo elapſos ante prædictum tempus quo*, &c. Upon which the Avowant demurr'd in Law. And this Avowry is grounded on the Statute of 32 *H.* 8. 37. which gives Diſtreſs to the Executor or Adminiſtrator, *in like Manner and Form as the Teſtator, &c. might or ought to have done.* But the Matter

(*a*) 1 Brownl. 170.

Matter in Law was founded on another Act made at the same Parliam. (*a*) c. 2. of Limitations, for by the same Act it is enacted, *That no Person or Persons shall hereafter make any Avowry, or Conusans for any Rent, Suit, or Service, and alledge any Seisin of any Rent, Suit, or Service in the same Avowry or Conusans; in the Possession of his or their Ancestor or Predecessor, &c. above forty Years next before the making of the said Avowry or Conusans.* And it was resolved *per totam Curiam*, That these Words ought to be intended where the Avowant was driven to alledge any Seisin by Force of any old Stat. of Limitation, and that was when the (*b*) Seisin was material, and of such Force that it should not be avoided in Avowry, altho' it were by Encroachment, as of Rent betw. the Lord and Ten. But in the Case of * Reservation or Grant of a Rent, there the Deed is the Title, and the Beginning thereof appears, and no Encroachments in that Case shall hurt, nor is any Seisin material: The same Law of a Gift in Tail, after the Stat. *de Donis conditionalibus* rendring Rent; there no Encroachment shall be prejudicial, or Seisin requisite, for the Reservation is the Title, and the Beginning thereof appears within Time of Memory: And this Construction stands with the Words of the said Act, for the Words are, *No Man shall make Avowry, and alledge any Seisin*, &c. By which it appears, that that Branch extends only where the Avowant ought to alledge Seisin; but when no Seisin is requisite, it is out of the Words and Intent of the Act, for it intends to limit a Time for the Seisin, when Seisin was required by the Law to be alledged, and not to compel any one to alledge Seisin where Seisin was not necessary bef. *Vide Plow. Com.* 94. in *Woodland*'s Case, *acc.* And so you will better understand your Books in 22 *Ass.* 68. 22 *Ed.* 3. 18. 30 *H.* 6. 5. *b.* 7 *Ed.* 4. 12 *Ed.* 4. 7. 20 *Ed.* 4. 17. 11 *H.* 7. 11. *b.* 10 *Ed.* 3. 25. 20 *Ed.* 3. *Avowrie* 131. 10 *H.* 6. 3. 4 *Ed.* 2. *Avowrie* 204. *F. N. B.* 10. & 163. *Vide* 8 *Ed.* 3. 18. *b.* 1 *Ma. Br. Avowrie* 107. & 14 *El. Dyer* (*c*) 315. & 16 *El.* in (*d*) *Warring*'s Case, in the Com. Pleas adjudg'd, That the Avowant need not in his Avowry shew Seisin within 40 Years, but the same shall come on the other Part, *scillicet*, not seised of the Services after the Limitation. Note Reader, Lessee for Life, or Donee in Tail, shall not have (*e*) *Ne injuste vexes* against the Donor, for inasmuch as the Reservation is the Title, no Encroachment upon them shall hurt them, but they shall avoid it in Avowry; and the Stat. of *Magna Charta*, *c.* 10. on which the Writ of *Ne injuste vexes* is (*f*) grounded, *scil. quod nullus distringatur ad faciend' majus servitium de libero tenemen' quam inde debetur*, doth not extend to Donee in Tail, Lessee for Life, or Grantee of a Rentcharge, which appears by these Words, *majus servitium*, which is meant between very Lord and very Tenant.

(*a*) Dyer 315. pl. 101, 330. pl. 19. 32 H. 8. cap. 2. 9 Co. 36. a. 1 Rolls. Rep. 50.

(*b*) 1 Brownl. 170. 10 Co. 108. a. Cr. Car. 81. 1 Anders. 16. Hetl. 41. 1 Jones 237. *Doct. pl. 317, 318

(*c*) 9 Co. 36. a. Cr. Car. 83. Hetl. 41. Dyer 315. pl. 101.

(*d*) Cr. Car. 83. Hetl. 42.

(*e*) F. N. B. 11. d.

(*f*) 2 Inst. 121. 9 Co. 33. b. Plowd. 243. b.

Mich. 6 Jacobi Regis.

LOVEDAY's *Case*.

Cr. Jac. 210, 211. Jenk. Cent. 283. Co. Ent. 393, nu. 27.

IN an Information in the Exchequer upon the Statute of *Usury*, by *C. qui tam*, &c. against *Loveday*, the Defendant pleaded to Issue, and a Jury was return'd who gave an imperfect Verdict, for they found an Acceptance, *&c.* and no (*a*) Loan, *&c.* wherefore the Court awarded a *Venire facias de novo*, and thereupon another Jury was returned and appear'd; and when they were ready to give their Verdict, the Plaintiff was nonsuit, upon which Judgment was given: And now the Plaintiff brought a Writ of *Error* in the Exchequer-Chamber, and assign'd for *Error*, that the Court of Exchequer in the said Case did err in granting a *Venire facias de novo*; but ought to have granted a new *Nisi prius*; for an imperfect Verdict is as no Verdict, as *Anno* 20 *Edw.* 4. 6. *a.* an insufficient Indictment is as no Indictment. And at the Common Law, if the Recognitors of an Assise give a Verdict which is not well examined by the Justices who take the Assise, but is imperfect, for Want of good Examination, in that Case the Plaintiff shall have a Certificate of Assise, and the first Imperfection shall be enquired by the first Jurors and that appears in *F. N. B.* 181. *b.* 7 *H.* 4. 45. *a.* 43 *Assis. pl.* 5. 12 *H.* 4. 9. and the Words of the Writ are, *Quia super quibusdam Articulis contingent' Assisam novæ disseis.* &c. *quædam sunt dubitationes*, &c. But it was resolv'd by the Court, and the two Chief Justices, That the *Venire facias de novo* was well awarded: For when a (*b*) Jury (returned by Force of any *Venire facias* to try an Issue, has given a Verdict which is accepted and recorded by the Court; be it perfect or imperf. the Jurors are discharged thereof for ever, and shall never be call'd back in the same Cause to try the same Issue; but if the Verdict be so imperfect that Judgm. can't be given

(a) Bridg. 112, 113.

(b) Cr. Jac. 210, 211.

given upon it, then the Court ſhall award a *Venire facias de novo* to try the ſaid Iſſue by others; and therewith agreeth the Book in 18 *E.* 3. 48. *b.* where it is reſolv'd, that in a *Ceſſavit*, becauſe the Enqueſt found Part to be held of the Demandant, and found not by what Services it was held, nor what Arrearages were behind, and for that Reaſon was not fully taken, that a *Venire facias de novo* ſhould be awarded to return a new Jury, and not a new *Niſi prius* to try the ſame Iſſue again by the ſame Jury. So in (*a*) 27 *H.* 6. 4. *a. b.* In Conſpiracy againſt divers, all plead Not-guilty, and one *Venire facias* was awarded againſt all, and the Sheriff returned not the Writ; and the Plaintiff prayed ſeveral *Venire facias* againſt the Defendants, and had it, and it was found for the Plaintiff, and all the Juſtices adjudg'd it a Jeofail, ſo that the Plaintiff could not have Judgment upon the ſaid Verdict, which was fully found, foraſmuch as the firſt Award was of one Joint *Venire*, the Plaintiff could not vary, (to have ſeveral Writs *de Venire facias*) from the firſt Award; and therefore the Court did award *Venire facias de novo*, 21 *H.* 6. 21. 21 (*b*) *E.* 4. 26. *b.* 27. *a.* And as to the Caſe (*c*) of Aſſiſe, the Recognitors are not returned to try any certain Iſſue, for there is a Jury the firſt Day before any Plaint, Plea, or Iſſue. 2. There no new Proceſs can be awarded; for the Recognitors who are once return'd ſhall ſtand; but when a Jury is returned on a *Venire facias*, which is a judicial Proceſs for the Trial of a certain Iſſue, there the Court, if the Verdict be imperfect, may award a new judicial Proceſs, *ſcil. Venire facias de novo*; but the Court cannot ſo do in Caſe of Aſſiſe, for they are return'd on the Original, and becauſe the Writ of Aſſiſe *de nova Diſſeiſina* is (*d*) *feſtinum remedium*, the Plaintiff ſhall have a Writ of *Certificate* of *Aſſiſe*, to ſupply the firſt Imperfections (which happen for Default of good Examination) according to the Truth of the Matter. And Judgment was affirmed.

(*a*) Fitz. Proceſs 94. Br. Replead. 40. Br. Venire fac' 2, 35.

(*b*) Br. Enqueſt 47.

(*c*) Cr. Jac. 210, 211.

(*d*) Ant. 50. a.

Mich. 6 Jacobi Regis.

EDWARD CROGATE's *Case.*

Doct. Pla. 114.

EDward Crogate brought an Action of Treſpaſs againſt *Robert Marys*, for driving of his Cattle in *Townbarningham* in *Norfolk*, &c. The Defendant pleaded, That a Houſe and two Acres in *Baſſingham* in the ſaid County, were Parcel of the Manor of *Thurgarton* in the ſame County, and demiſed, and demiſable, *&c.* by Copy, *&c.* in Fee-ſimple, *&c.* according to the Cuſtom of the Manor, of which Manor *William* late Biſhop of *Norwich* was ſeiſed in Fee in the Right of his Biſhoprick, and preſcribed to have Common of Paſture for him and his Cuſtomary Tenants of the ſaid Houſe, and two Acres of Land *in magna pecia paſturæ vocat' Baſſingham* Common, *pro omnibus averiis*, &c. *omni tempore anni*, and the ſaid Biſhop at ſuch a Court, *&c.* granted the ſaid Houſe and two Acres by Copy to one *Will. Marys*, to him and his Heirs, *&c.* and that the Plaintiff put to his ſaid Cattle in the ſaid great Piece of Paſture, wherefore the Defendant, as Servant to the ſaid *William*, and by his Commandment, *molliter* drove the ſaid Cattle out of the ſaid Place, where the ſaid *William* had Common *in præd' villam de Townbarningham*, adjoining to the ſaid Common of *Baſſingham*, &c. The Plaintiff reply'd, *de injuria ſua propria abſque tali cauſa:* Upon which the Defendant demurr'd in Law. And it was objected on the Plaintiff's Part, that the ſaid Replication was good, becauſe the Defendant doth not claim any Intereſt, but juſtifieth by Force of a Commandment, to which *de injuria ſua propria abſque tali cauſa* may be fitly applied: And this Plea *De injuria ſua propria*

ſha

shall refer only to the Commandment, and to no other Part of the Plea, and they cited the Books in 10 *H.* 6. 3. *a. b.* 9. *a.* 16 *H.* 7. 3. *a. b.* &c. 3 *H.* 6. 35. *a.* 19 *H.* 6. 7. *a. b.* &c. But it was adjudged, That the Replication was insufficient. And in this Case divers Points were resolved. 1. That *absque tali causa*, doth refer to the (*a*) whole Plea, and not only to the Commandm. for all maketh but one Cause, and any of them, without the other, is no Plea by itself. And therefore in (*b*) a false Imprisonment, if the Defendant justifies by a *Capias* to the Sheriff, and a Warrant to him there, *De injuria sua propria* generally is no good Replication, for then the Matter of Record will be Parcel of the Cause (for all makes but one Cause) and Matter of (*c*) Record ought not to be put in Issue to the Common People, but in such Case he may reply, *De injuria sua propria*, and traverse the Warrant, which is Matter in Fact. (*d*) But upon such a Justification by Force of any Proceeding in the *Admiral* Court, Hundred or County, &c. or any other which is not a Court of Record, there *De Injuria sua propria* generally is good, for all is Matter of Fact, and all makes but one Cause. And by these Differences you will agree your Books in 2 *H.* 7. 3. *b.* 5 *H.* 7. 6. *a. b.* 16 *H.* 7. 3. *a.* 21 *H.* 7. 22. *a.* 19 *H.* 6. 7. *a. b.* 41 *E.* 3. 29. *b.* 17 *E.* 3. 44. 18 *E.* 3. 10. *b.* 2 *E.* 4. 6. *b.* 12 *E.* 4. 10. *b.* 14 *H.* 6. 16. 21 *H.* 6. 5. *a. b.* 13 *R.* 2. *Issue* 163.

(*a*) Cr. Jac. 599. 2 Leon. 81. 2 Sand 295. Doct. Pla. 114. 3 Bulstr. 285. Cr. Car. 138.

(*b*) Doct. Pla. 114. 2 Leon 81.

(*c*) 4 Co. 71. b. 9 Co. 25. a. Co. Lit. 260. a.

(*d*) Doct. Pla. 114.

2. It was resolv'd, That when the Def. in his own Right, or as a Serv. to anoth. claims any (*e*) Interest in the Land, or any Common, or Rent going out of the Land; or any (*f*) Way or Passage upon the Land, &c. there *De injuria sua prop'* generally is no Plea. (*g*) But if the Def. justifies as Servant, there *De Inju' sua prop'* in some of the said Cases, with a Traverse of the Commandment, that being made material is good; and so you will agree all your Books, *scil.* 14 *H.* 4. 32. 33 *H.* 6. 5. 44 *E.* 3. 18. 2 *H.* 5. 1. 10 *H.* 6. 3. 9. 39 *H.* 6. 32. 9 *E.* 4. 22. 16 *E.* 4. 4. 21 *E.* 4. 6. 28 *E.* 3. 98. 28 *H.* 6. 9. 21 *E.* 3. 41. 22 *Ass.* 42. 44 *E.* 3. 13. 45 *E.* 3. 7. 24 *E.* 3. 72. 22 *Ass.* 85. 33 *H.* 6. 29. 42 *E.* 3. 2. For the general Plea *De Inju' sua prop'* &c. is properly when the Def. Plea doth consist meerly upon Mat. of (*h*) Excuse, and of no Mat. of Interest whatsoever; *& dicitur de inju' sua prop'*, &c. because the Injury properly in this Sense is to the Person, or to (*i*) the Reputation; as Battery or Imprisonment to the Person; or, Scandal to the Reputation; there, if the Defen. excuse himself upon his own Assault, or upon Hue and Cry, levied there properly (*k*) *De inju' sua prop'* generally is a good Plea, for there the Defendant's Plea consists only upon Matter of Excuse. 3. It was resolv'd, That (*l*) when by the Defendant's Plea any Authority or Power is mediately or immediately derived from the Plaintiff, there, although no Interest be claimed,

(*e*) Doct. Pla. 114. Cr. Eliz. 539, 540. Cr. Jac. 225. Yelv. 157. 1 Brownl. 215.

(*f*) Cr. Jac. 599.

(*g*) Doct. Pla. 114-5

(*h*) Doct. Pla. 115.

(*i*) Doct. Pla. 115. Cr. Eliz. 607.

(*k*) Doct. Pla. 115.

(*l*) Doct. Pla. 115.

the Plaintiff ought to answer it, and shall not reply gene-
(a) Doct. pla. 115. rally *De Injuria sua propria*. The same Law of an (a) Authority given by the Law; as to view Waste, *&c. Vide* 12 *E.* 4. 10. 9 *Ed.* 4. 31. 20 *Edw.* 4. 4. 42 *Edw.* 3. 2. 16 *Hen.* 7. 3.

Lastly, It was resolv'd, That in the Case at Bar the Issue wou'd be full of Multiplicity of Matter, where an Issue ought to be full and single, for Parcel of the Manor, demisible by Copy, Grant by Copy, Prescription of Common, *&c.* and Commandment wou'd be all Parcel of the Issue. And so by the Rule of the whole Court, Judgment was given against the Plaintiff.

Mich.

Mich. 6 Jacobi Regis.

JOHN TROLLOP's *Case.*

Lancelot Richeſon brought Debt on a Bond of 34 *li.* by *Quo minus* in the Exchequer againſt *John Trollop*, Eſq; and upon Iſſue and Verdict had Judgment againſt *Trollop*, upon which *Trollop* brought a Writ of *Error* againſt the ſaid *Richeſon*, who pleaded an Excommunication, *& profert hic in Cur' literas Clementis Colnor, Legum Doctoris, Reverendi in Chriſto patris, Tobiæ nuper Dunelm' Epiſcopi vic' in ſpiritualibus generalis, & officialis principalis legitime fulciti, ſigillo conſiſt' Dunelm', ſignat'*, viz. *Clemens Colnor*, &c. *univerſis & ſingulis Clericis & literatis quibuſcunque per totam diœceſin Dunelm' ubilibet conſtitut' ſalut'*: and recited that he did proceed againſt him for Recuſancy, and that *propter ipſi' contumaciam in non comparendo*, &c. being lawfully cited and forwarn'd, he was excommunicated, *Vobis igitur tenore Præſentium madamus quatenus præfat' Joh' Trollop, ſic ut præmittitur per nos excommunicatum fuiſſe & eſſe, in Eccleſia veſtra Parochial' diebus Dominicis, & aliis feſtivis*, &c. *publice denuncietis, & cum effectu declaretis*, &c. and demanded Judgment if he ſhould be anſwered. The Plaintiff ſaid, That after the ſaid Excommengment, the King by his general Pardon in his Parliament *Anno 3*, did pardon all Contempts, *&c.* and all that he might pardon; and averred that neither the Offence nor the Perſon *&c.* is excepted, *&c.* Upon which the Def. in the Writ of Err. did demurr in Law. And it was reſol. by the Court, and the two Chief Juſt. that the ſaid Plea of Excomm. was inſuf. for two Cauſes. 1. Becauſe the Excommeng. is certified by the Official or Commiſſ. of the Biſh. where it ought to be certified by the (*a*) Biſhop, who is the immediate Officer to the Court, for none ſhall certify an Excommu. whereby any ſhall be diſabled, but he to whom the Court may write to abſolve him who was excommunicated, as the Biſhop, Guardian of the (*b*) Spiritualities, *&c.* and therewith agree the Books in the Point in 44 *E.* 3. *Excommengment* 23. 20 *E.* 3. *Excommengement* 24. 41 *Aſſ. p.* 29. (*c*) 20 *H.* 6. 1. *a.* (*d*) 8 *H.* 6. 3. (*e*) 7 *E.* 4. 14. *a.* 14 (*f*) *H.* 4. 14. *a. b. Vide* 11 *H.* 6. 64. *a.* *Hank.* That it was ſo ordained by the (*g*) Parliament, (*h*) 12 *E.* 4. 15. *b.* 16. *a. F. N. B.* 64. *c.* 65. *a.* But the

Cr. Jac. 212.

(*a*) 2 Brownl. 361. Co. Lit. 134. a.

(*b*) F. N. B. 62. m.

(*c*) Fitz Excom. 11. Br. Excom. 2. 19. Br. Certificate del eveſque 1. (*d*) Br. Excom. 5. Br. Certificate

del eveſque 16. (*e*) Br. Excom. 14. Fitz. Excom. 16. (*f*) Fitz. Excom. 21. Br. Excom. 5. (*g*) Fitz. Excom. 20. Co. Lit. 134. a. (*h*) Fitz. Excom. 17. Br. Excom. 15. Br. Nonability 33.

(a) Reg. Orig. 67. b.

the (a) Chancel. of the Univers. of *Cambr.* or *Oxf.* may certifie an Excom. for they do it by the King's Charter, *Register*, *F. N. B.* 64. *c.* 2. If the Bishop himself had certified it, yet it had been insufficient, for the Direction ought to be either to * this Court in particular, or at least, *Universis sanctæ matris Ecclesiæ filiis*: But in the Case at Bar it is directed, *Universis & singu' Cler' & literat' quibuscunq' per totam diœcesin Dunelm' ubilibet constitut'*, by which partic. Direct. this Court is exclud. as a Certific. of an Excom. in the Chanc. shall not serve in any other Court; neither shall a (b) Protection directed to one Court, serve in another; for always a Certific. directed to a partic. Court, and in a partic. Manner, shall not be extended farther; and therewith agree (c) 20 *Hen.* 6. 25. *a.* (d) 2 *Edw.* 4. 4. And it was objected, That an Excom. is a Spiritu. Judgm. and theref. the Temp. Judges shall not dispute upon the Manner of it. To which it was answ. and resolv. That the Judges of the Common Law shall adjudge upon the Manner (and in some Cases) of the Matter also of the Certific. in Case of Excommu. as if the Bishop hims. be sued, and he pleads an Excom. (e) by hims. or his Commis. (who is as his Deputy) altho' it be for another Cause than is then in Question, it shall not disable the Plain. because he hims. is Party, and therew. agree 16 *E.* 3. *Excom.* 5. 5 *E.* 2. *Excom.* 27. 5 *E.* 3. 8. 8 *E.* 3. 69. 18 *E.* 3. 58. 9 *H.* 7. 21. *b.* 10 *H.* 7. 9. *a.* Also if a Prohibition be brought against a Bp. and he shews forth the Letters of the Abp. that the Plain. is excom. *propter* (f) *diversas contumacias*, without shewing any Cause in Special of the Excommun. it shall not disable the Plain. The same Law if any other be Def. in any Acti. and would disable the Plain. by Excommun. he ought to shew the Bp's Certific. contain. the Specialty of the principal Cause for which the Plain. is excommu. to the End that the Judges of the Law may know whether the Spiritu. Court have Conusans of the orig. Cause, and if the Excom. be against Law, the Court ought to write to them to absolve the Party; which they can't do if the Certific. be gen. and if the Bp. refuses it, his Temporali. at the Com. Law shall be seised, 28 *E.* 3. 97. *a.* 22 *E.* 4. 20. *b.* 20 *E.* 3. *Excom.* 9. 13 *H.* 7. 16. *b.* and in 14 *H.* 4. 14. *b.* *Hanks* there saith, That a (g) Doctor of the Civil Law told him, That no Let. of Certific. of Excom. (altho' it be of the Bp.) should be allow'd, if the princi. Cause be not cont. in the Writ; *F. N. B.* 64. *f.* The Bp. ought to expr. the Cause and Suit against the Plain. speci. in the Certific. *vide* 3 *H.* 4. 3. *b.* mistaken in the Rep. For the Opin. there is refor. in 14 *H.* 4. 14. as app. bef. *Vide Flet. lib.* 6. *c.* 26. *West.* 2. *c.* 43. Also the Bp. ought to cert. that whi. hath been senten. in his own Cou. and not in anoth. C. And theref. he can't certify, that (h) anoth. Bp. hath certified to him, or that he hath seen a Sent. of Excom. made by another Bishop; but

(b) Fitz. Excom. 15. Co. Lit. 131. a. 2 E. 4. 4 b.

(c) Br. Excom. 3. Fitz. Excom. 12.

(d) Fitz. Excom. 15. Br. Excom. 15. Br. Excom. 13.

(e) Br. Excom. 12. Swinb. 305. 3 H. 4. 3. b. Co. Lit. 134. a. Br. Nonability 55. Cawly 217.

(f) Fitz. Excom. 3 28 E. 3. 97. a. 2 Bulstr. 139. Salk. 293. 294. Parr. 57. 117.

(g) Fitz. Excom. 21.

(h) F. N. B. 65. a. Co. Lit. 134. a.

but the Biſhop may certify an Excommengement made by his Commiſſary or Official, for that the Biſhop's Court and his Commiſſary doth in his Right, *F. N. B.* 65. *a.* 33 *E.* 3. *Excom.* 29. 9 *H.* 7. 21. *b.* 10 *H.* 7. 8. *b.*

If the Biſhop makes a Certificate, and (*a*) dies before it be receiv'd, it is nothing worth, but his Succeſſor ought to certify it, *F. N. B.* 65. 8 *E.* 2. *Excom.* 26. 14 *E.* 3. *ibid.* 8. But Note, Reader, that in ſome Caſe the Vicar General may certify an Excommengement; but that is when the Biſhop is in (*b*) *remotis agendis*, which is as much as to ſay, *extra Regnum* in the King's Service; But the Court will be apprized of it by Matter of Record, *ſcil.* by Writ out of the Chancery directed to them, and not by the Surmiſe of the Party, and then for Neceſſity (which is always the Law of Time, for *Neceſſitas eſt Lex Temporis*) the Certificate of the Vicar General ſhall be allow'd, becauſe no other can make it. And therewith agree 31 *E.* 3. 10. (*b*) *F. N. B.* 64. And after a Biſhop is elected, and before he is (*c*) conſecrated, he may certify an Excommengement, for the Power of the Guardian of the Spiritualities * ceaſes after he is elected by the King's *Conge de Eſlier*: And therefore for Neceſſity he ought to certify it. *F. N. B.* 62. *N.* and *Regiſter.*

(*a*) Co. Lit. 134. a.

(*b*) Co. Lit. 134. a. F. N. B. 62. n.
(*c*) 2 Rolls Rep. 451. F. N. B. 62. n. Latch. 32.
* Palm. 464.

And it is to be known, That when a Plea of Excommengement is allow'd, the Writ ſhall not abate, but the Entry is, (*d*) *Quod remaneat loquela ſine die quouſque*, &c. 3 *Hen.* 6. 3. 3 *Edw.* 4. 8. 3 *Aſſ. p.* 12.

(*d*) Lit. Sect. 201. Antea 62. b. Co. Lit. 134. b.

The Point in Law in the Caſe at Bar, if the Certificate had been good, was, If the general (*e*) Pardon diſcharged a Man excommunicated of the Excommunication or not, and by the Award of the Court, the Defendant was ruled to anſwer over.

(*e*) Cr. Car. 199. Cr. Jac. 159, 212.

Hill.

Hillarii 6 Jacobi *Regis*, *which began* Mich. 6 Jacobi. Rot. 1316.

In the Common Pleas.

WHITLOCK'S *Case.*

Co. Entries 600. Numero 15. 1 Brownl. 169. 2 Roll. Rep. 274. 2 Bulstr. 273.

IN a *Replevin* between *John Chappel* Plaintiff, and *William Whitlock* Defendant, for taking of a Gelding in *Rings-Ash*, in the County of *Devon*, in a Place called *Canny-Park*; the Defendant avow'd the taking in the Place where, &c. as in his Freehold, for Damage Feasant. The Plaintiff in Bar of the Avowry pleaded, That one *William Whitlock* the Elder was seised of a Messuage, 20 Acres of Land, 12 Acres of Wood, and 20 Acres of Heath in *Rings-Ash* aforesaid in Fee, whereof the Place where is Parcel, and demised the said Tenements to one *John Bullhead* for his Life, by Force whereof he was seised for Life, the Reversion expectant to the said *William Whitlock* the Elder, and the said *William Whitlock* the Elder, 11 *Marcii*, 18 *Eliz.* by his Indenture Tripartite, in Consideration of a Marriage to be solemnized between *William Whitlock* the Younger, and *Margaret* Daughter of *John Botler*, covenanted and agreed by the said Indentures, That the said *William Whitlock* the Elder, before the Feast of the Birth of Christ next ensuing, would assure and convey to *Leon. Yeo*, and *Anthony Whitlock*, and their Heirs, the Tenements aforesaid, to the Uses, Intents and Purposes expressed and declared in the said Indentures, and to no other Uses or Intents, *viz.* 'till the said Marriage, to the Use of the said *William Whitlock* the Elder and his Heirs, and after the said Marriage to the Use of *William Whitlock* the Elder for his Life, without Impeachment of Waste, and afterw. to the Use of the said *Will. Whitlock* the Young. and the Heirs of his Body, and aft. to the

the Use of *J. Whitlock* and his Heirs: *Et per eand' Indenturam ulterius provisum, concessum & agreatum fuit, quod liceret & licitum foret prad' Will' Whitlock Sen' ad aliquod Temp' extunc facere dimissionem, (Anglice Lease) sive dimissiones, concessionem sive concessiones, tam in possessione quam in Reversione de Tenementis prad' cum pertin', unde &c. inter alia, sive de aliqua parte inde. Proviso semper quod prad' dimissio sive dimissiones, concessio sive concessiones non excederent sup' numerum trium vitarum ad majus vel viginti & uni' annor', & ita quod super quamlib' talem dimission' & dimission' concession' & concessiones, maxime antiq' & consuet' annual' reddit', heriot & servitia sive plus redderentur & reservarentur, solubil' duran' dict' dimissione sive dimissionib' concessione sive concessionibus*: And that the said *Leon'* and *Anth'* and their Heirs, should stand seised, *&c.* to the Use of every such Fermor, *&c.* And afterwards, 18 *Maii*, 18 *Eliz.* the said *William* the Young. and *Margaret* entermarried, and afterwards, *Trin.* 18 *Eliz. William Whitlock* the Elder levied a Fine of the Tenements aforesaid, according to the same Indentures, to the Uses therein contained, by Force whereof, and of the Statute of *Uses*, the said *William Whitlock* the Elder was seised of the Reversion of the said Tenements, *&c.* for his Life, the Remainder over according to the said Indentures. And the said *William Whitlock* the Elder so seised, 1 *Septemb.* 31 *Eliz. dimisit cuidam Christian' Hearne tenem' prad' cum pertin', unde &c. inter alia, hab' & occup' eid' Christiana & Assignat' suis pro term' 99 annor' plenarie complend' & finiend', si prad' Christiana & quid' Petr' Rattenbury, sive eorum alter, tam diu vivere contingeret*: the said Term to commence after the Death or Determinat. of the Estate of the said *John Bullhead*, *reddenda & solvendo proinde annuatim post inceptionem dictæ dimissionis, præfato Will' Whitlock Sen' hæred' & assign' suis & tali persona & personis quib' hæreditament' præmissorum post mortem prad' Will' Whitlock Sen' de jure spectaret seu pertineret durante dicto Termino* 14 *s. ad quatuor maxime usualia festa annuatim solvend' &c.* And the Plaint. justified under the said Lease, and averred the Life of the said *Pet. Rattenbury*, and that the most antient and accustomed yearly Rents, Heriot and Services, *&c.* were reserved, *&c.* upon which the Avowant did demur in Law. And in this Case 2 Questions were moved. 1. Wheth. *Will. Whitl.* the Elder had pursued his Authority or not, in making the said Lease for 99 Years, determinable on the said two Lives. 2. Wheth. the said Reservation of the Rent was record. to the said *Ita quod, &c.* And as to the 1st it was object. That the Authority was distinguish'd, *sc.* eith. to make a Lease not exceed. the Numb. of 3 Lives, or for 21 Years, by which

2 Roll. Rep. 274. 2 Roll. 260.

Postea 71. a.

2 Roll. Rep. 174. 2 Roll. 260.

1 Co. 139. a. Postea 71.

it

it appears that the Intention was either to make a Leaſe for three Lives, *&c.* or if he would make a Leaſe for Years, that it ought to be for 21 Years; but in the Caſe at Bar, the Leaſe is not for 3 Lives, *&c.* nor for 21 Years, but for 99 Years, if two or either of them ſhall ſo long live, and ſo his Authority not purſued. And if (*a*) one hath Power to make a Leaſe for three Lives, he cannot make a Leaſe for 99 Years determinable upon three Lives, *&c. quod fuit conceſſum per totam Curiam.* But it was anſwer'd and reſolv'd by the Court, that in the Caſe at Bar the Leaſe was good, and the Power which the Leſſor had was well purſued; For the Proviſo of Creation of his Power to make Leaſes is in the Beginning abſolute, affirmative and indefinite, *ſcil.* to make a Leaſe or Leaſes, Grant or Grants, *&c.* as well in Poſſeſſion as in Reverſion of the Tenements, or any Parcel thereof, *&c.* which is without any Limitation. Then the Proviſo of Correction is added, *ſcil.* That ſuch Leaſe or Leaſes, Grant or Grants, ſhall not exceed the Number of three Lives at moſt, or 21 Years, which Clauſe is negative, and qualifies the Generality of the firſt Proviſo; So that the Power by the firſt is general, and by the ſecond the Leaſe ought not to exceed three Lives, *&c.* And when the Leaſe is made for 99 Years determinable upon two Lives, it doth not exceed the Number of three Lives, altho' in Truth it is not a Leaſe for Lives. 2. The Power is to make Leaſes as well in Poſſeſſion as in Reverſion, with the Limitation aforeſaid; and a Leaſe for three Lives cannot be made in Reverſion, but a Leaſe for Years determinable upon Lives may, and the Leſſor himſ. had but a Reverſion expectant on an Eſtate for Life at the Time of the Creation of the ſaid Power: So that the Intention of the Parties was to make a Leaſe for Years abſolutely but for 21 Years, but any Term of Years determinable upon 3 Lives, *&c.* which is in Equipage with 21 Years, he well might. And the Difference was taken and agreed between a particular Power affirmative, and a general Power reſtrained with a Negative: For it is true, that if one hath Power to make a Leaſe for three Lives, or 21 Years, he can't make a Leaſe for 99 Years, if three ſhall ſo long live, *&c.* but if he has Power to make any Leaſe or Grant, provided ſuch Leaſe or Grant ſhall not exceed the Number of three Lives, or 21 Years, there he may make a Leaſe for 99 Years, if three ſhall ſo long live, for that doth not exceed the Number of 3 Lives, but in Truth is leſs; for every Term for Years, which is but a Chattel, is leſs in Eſtimation of Law than an Eſtate for Life, which is a Freehold. As to the ſecond Point it was objected, That the ſaid Reſervation was ſuch, that it was not payable during the ſaid Leaſe as it ought, but only during the Life of the Leſſor; for he having but an Eſtate for Life, reſerved the Rent to him and his Heirs, and his Heirs cannot have it, and the latter

(*a*) 2 Roll. 260. 2 Roll. Rep. 274. 2 Roll. 260.

Cro. Car. 289.

latter Words, *scil.* To such Person and Persons who shall have the Inheritance of the Premisses, *&c.* are meerly void, for no Rent can be (*a*) reserved but to the Lessor, Donor, or Feoffor, and his Heirs, who are Privies in Blood, and not to any who is Privie in Estate, as to him in Reversion, Remainder, *&c.* But it was resolved, That the * Reservation in the Case at Bar is good. For the said Lease hath not its Essence from the Estate of the Lessor, which he hath for Life, but the Lease hath its Essence out of the said Fine, and in Construction of Law (*b*) preceeds the Estate for Life and all the Remainders; for after the Lease made, it is as much as if the Use had been limited originally to the Lessee for the said Term, and then the other Limitations in Construction of Law follow it: And that is the Reason that the usual Clause in such Indentures is, That the Conusees and (*c*) their Heirs shall stand seised to the Use of such Lessees, *&c.* So that the Lessee in the Case at Bar derives his Estate out of the Estate which passed by the Fine. Then when the Lessor reserves Rent to him and his Heirs, it is good, for that by Construction of Law preceeds the Limitations of the Uses, and then it being well reserved, it is well transferred to every one to whom any Use is limited. So if the Reservation be to the Lessor, and to every Person to whom the Inheritance or Reversion of the Premisses shall appertain during the Term, that is likewise good, for the Law will distribute it to every one to whom any Limitation of the Use shall be made. And in such Case no Rent is reserved to a Stranger, for the Reservation preceeds the Limitation of the Uses to Strangers. But it was agreed, That the most clear and sure Way was to (*d*) reserve Rent yearly during the Term, and leave the Law to make the Distribution, without an express Reservation to any Person. But it was resolved, That all the said three several Ways were good enough and effectual in Law.

(*a*) Hob. 130. 2 Roll. 447, 450. Co. Lit. 47. 2. 143. b. 213. 2. 2 Cro. Car. 289.

* Antea 70. 2. 1 Co. 139. 2.

(*b*) Moor. 383.

(*c*) Antea 70. 2.

(*d*) 1 Inst. 47. 2. Hardres 90. 1 Jones 309. Plowd. 171. 2 Sand. 369. 21 H. 7. 25. b. Goldsb. 148.

Pasch.

Paſch. 7 Jacobi Regis.

GRENELEY's *Caſe.*

1 Brownl. 131.

IN an *Ejectione firmæ* between *Owen Greneley* Plaintiff, and *Philip Greneley* and others Defendants on a Demiſe made by *Stephen Greneley* of three Acres of Land in *St. Super Arrow in Com' Hereford'*, and on Not Guilty pleaded, the Jury gave a ſpecial Verdict to this Effect: *William Woodhouſe* and *John Badland* were ſeiſed of the ſaid three Acres in Fee, and *Octob.* 20. 38 *Hen.* 8. did thereof enfeoff *Philip Greneley* the Elder, and *Iſabel* his Wife, To have and to hold to the ſaid *Philip* and *Iſabel*, and to the Heirs of their two Bodies lawfully begotten: The ſaid *Philip* the Elder, 1 *Decemb.* 17 *Eliz.* did enfeoff *Philip Greneley* the Younger of the ſaid three Acres in Fee; and afterwards 20 *Eliz.* *Philip* the Elder died, and *Iſabel* ſurvived him; and afterwards the ſaid *Iſabel* (before any Entry made by her, *viz.* 26 *Eliz.*) died; and the ſaid *Stephen Greneley* the Leſſor of the Plaintiff was Heir of their two Bodies begotten, *&c.* And the only Queſtion in this Caſe was, whether the ſaid Feoffment of *Philip* the Elder to *Philip* the Younger, had tolled the Entry of the ſaid *Stephen*, or that the Entry of *Stephen* was lawful or not. 1. It was reſolved, That at the Common Law this (*a*) Feoffment was a Diſcontinuance to the Iſſue, for the Iſſue ought to claim as Heir of their two Bodies individually, and as Heir to one only he cannot inherit, and by Conſequence cannot enter; for his Entry ought to enſue his Title and his Action, and the Formedon in the Deſcender in ſuch Caſe is, *Quod C. dedit D. & E. uxori ejus & hæredibus de corporibus ipſorum D. & E. exeuntibus, & quod poſt mortem prædict' D. & E. præfato K. filio & hæred' eorundem D. & E. deſcendere debet per formam donationis prædict'*, &c. *Regiſt' Orig'* 238. *b.* By which it appears that in his Formedon

(*a*) 1 Roll. 634. Co. Lit. 326. a. b. Plowd. 112. b.

Formedon he ought to make himself Heir to both, and not to the Survivor: So if the said Donees had been disseised, and a Descent cast, and afterwards the Fath. died, and bef. Entry the Moth. died, the Entry of the Issue is not congeable, bec. he ought to claim as Heir of both their Bodies, and as Heir to the Father he is bound by the Descent, as his Fath. himself was, and as Heir to his Moth. only he cannot enter, for he hath not any such Title. *Vid.* 35 *H.* 6. 45. *b.* in Assise, but if the Moth. in such Case had entred, and re-contin. the Estate Tail, then the Discontinuance was purg'd and utterly removed, and the Estate tail actually revested in the Wife; which after her Death descends to the Issue. 2. It was resolved, That altho' the Husb. and Wife had a (*a*) joint and undivided Estate Tail, and that the Words of 32 *H.* 8. *cap.* 28. are, *That no Fine, Feoffment, or other Act or Acts hereaft. to be made, suffered, or done by the Husb. only, of any Manors, Lands, Tenem. or Hereditam. being the Inherit. or Freeh. of his Wife, during the Coverture betw. them*, &c. That this joint Estate was within these Words, (*the Inherit.* (*b*) *or Freeh. of his Wife*) for she hath a Freeh. and Inherit. in the Land, altho' she hath not the sole Freeh. or Inherit. So hath it been alw. taken upon the Stat. of *West.* 2. (*c*) *cap.* 3. *In casu quando vir amiserit per defalt' tant', quod fuit jus uxoris suæ*, &c. *propter quod Rex statuit, quod mulier post mortem viri sui habeat Recuperare per breve de Cui in vita*, &c. that a joint Estate to Husb. and Wife hath been alw. taken within these Words (*jus uxor'*) and yet *non fuit sol' aut unic'* (*d*) *jus uxor':* and accord. to this Resolution in the princip. Case was it adjudg'd in (*e*) *Beaumont's* Case, and therew. agr. (*f*) 3 *Eliz. Dy.* 191. b. *Hawtry's* Case. 3. It was resolv'd, That by the said Act the (*g*) Entry of the Issue in tail was lawful in the Case at Bar; for the Words of the Act go farther, *shall in any wise be or make any Discontinuance, or be prejudicial or hurtf. to the said Wife, or to her Heirs, or to such as shall have Right, Title, or Interest to the same, by the Death of such Wife or Wives. But that the same Wife or her Heirs, and such other to whom such Right shall appert. after her Decease, shall or may then lawfully enter into all such Manors, Lands, Tenem. and Hereditam. accord. to their Rights and Titles therein.* So that if the Issue in Tail shall not be within these Words, (*her Heirs*) bec. he is Heir to both, *sc.* to Fath. and Moth. yet without Question he is within these Words, (*or to such as have Right by the Death of such Wife.*) And in this Case a Difference was tak. and agreed betw. a Discontin. which implies a Wrong, and a lawf. Bar which implies a Right; and theref. if Lands are given to Husb. and Wife, and to the Heirs of their two Bodies begotten, and the (*h*) Husb. levies a Fine with Proclamations,

(*a*) Co. Lit. 326. a.

(*b*) Cro. Car. 22.

(*c*) 2 Inst. 342, 343.

(*d*) 2 Inst. 343. Cro. Car. 22.

(*e*) 9 Co. 138. b. 139. Cro. Car. 476. 1 Jon. 393.

(*f*) Dy. 191. pl. 22. Hob. 71, 255, 256.

(*g*) Co. Lit. 326. a. 1 Brownl. 131.

(*h*) 1 Co. 87. b. 9 Co. 139. a. Dy. 351. pl. 24. 2 Inst. 681. Hob. 257, 333. Moor 147.

1 Brownl. 140. 1 Leon. 84, 157. Dall. in Kelw. 205. pl. 7. Dall. in Ash. pl. 7. Dall. 50, pl. 16. And. 39. pl. 101. Godb. 312. N. Bendl. 225. pl. 257. Bendl. in Ash. pl. 27. Bendl. in Kelw. 13. pl. 27. 1 Roll. Rep. 424. 2 Roll. Rep. 321. Mo. 28. pl. 90, 114. pl. 256. Cr. Car. 478. Jones 49. Lit. Rep. 291.

(a) 1 Co. 139. a. 140 a. Dyer 332. Pl. 227. Hob. 257, 346. 3 And. 39. Pl. 102. Godb. 312. Raym. 6, 7. 2 Roll. Rep. 321. Mo. 114. Pl. 256. Moor 147. 1 Brownl. 139, 140 Cro. Car. 478. 1 Jones 40.

(b) Dyer 122. Pl. 22.

tions, and commits High *(a)* Treaſon, and dies, and the Wife before, or after Entry dies, there the Iſſue is barred; and the Conuſee, or the King hath Right to the Land, becauſe the Iſſue cannot claim as Heir to both; and therewith agrees 18 *Eliz.* 351. *b.* adjudged. *Vid.* 5 *Hen.* 7. 32. *(b) Colt's Aſſize.* And it was reſolv'd, That the Stat. of 32 *Hen.* 8. extends only to Diſcontinuances, altho' the Act hath general Words, *or be prejudicial or hurtful to the Wife or her Heirs*, &c. But the Concluſion is, *ſhall lawfully enter*, &c. *accord. to their Rights and Titles therein*, which they cannot do, when they are barr'd, and have no Right, Title, or Intereſt; and this Stat. gives Advantage to the Wife, *&c.* ſo long as ſhe hath Right, but it doth not extend to take away a future Bar, altho' the Stat. gives Entry without limitat. of any Time, but the Entry ought to wait upon the Right. And theref. if the Husb. levies a Fine with Proclamat. to another, and dies, now the Wife *(c)* may enter by Force of the Stat. For yet the Fine is not any Bar to her, but her Right remains, which ſhe may re-continue by Ent. but if ſhe ſurceaſes her Time, *(d)* and 5 Years paſs witho. Ent. *&c.* now by Force of the Fine with Procl. and 5 years paſt aft. the Death of her Husb. ſhe is barr'd of her Right, and by Conſequence ſhe cannot enter; and the Stat. ſpeaks of Fine only, and not of Fine with Proclamations; and therew. agrees the 6 *E.* 6. *Dy.* 72. *b.* And it was reſolv'd, That if the Husb. be Ten. in Tail, the Remainder to the Wife in Tail, that if the Husb. makes a Feoffm. in Fee, and dies without Iſſue, the Wife may enter, becauſe it was the Inherit. of the Wife; But if the Husb. ſuffers a Common Recovery, and dies without Iſſue, there the Wife is barr'd, and cannot enter by Force of this Statute: But this Statute was made to relieve him who has Right, and to ſuppreſs Wrong, and to advance Right without any Reſpect to the Warranty of the Diſcontinuee, if he hath any. And if *(e)* before the Statute *De Donis conditionalibus* Lands had been given to Husband and Wife, and the Heirs of their two Bodies begotten, and they have Iſſue, and the Husb. *poſt prolem ſuſcitatam* aliens, and dies bef. the Stat. and the Wife ſurvives, and dies after the Stat. the Iſſue ſhall have a Formedon: For notwithſtand. the ſaid Alienation, a Right remains, for as much as the Husb. only aliens, which Right is entailed by the Statute; and before the Statute the Iſſue in ſuch Caſe might have a *Sur cui in vita*, and claim as Heir of the Body of both, for the Feoffment was no Bar, but a Diſcontinuance: And therewith agrees 21 *Edward.* 3. 45. *a. b.* 12 *Hen.* 4. 7. And in all Caſes where the Wife might have a *Cui in vita* at Common Law, ſhe ſhall enter by Force of this Statute of 32 *Hen.* 8. and where the Iſſue cannot have a *Sur cui in vita*, or Formedon, there he ſhall not enter within the Remedy of this Statute. And therefore if the Husband has Iſſue, and aliens, and the Wife dies, the Iſſue ſhall not enter *(f)* during

(c) 1 Roll. Rep. 91, 92, 160. 9 Co. 140. b. 10 Co. 49. b. Co. Lit. 326. a. Dy. 72. Pl. 3. Cro. Car. 201.

(d) 2 Co. 93. a. 10 Co. 49. b. 99. a. Dy. 224. Pl. 28. Palm. 235. Goldsb. 148. 3 Leon. 221. Moor 53. 2 Roll. Rep. 409. 3 Inſt. 216. Cro. Jac. 333.

(e) 9 Co. 140. a. Co. Lit. 19. a.

(f) Moor 58. Co. Lit. 326. a.

Life of the Husband, because at the Common Law he no Remedy to recover the Land during the Husband's and the Words of the Act are, *according to their Right Title therein*. But if the Husband aliens, and afterwards Wife (*a*) is divorced *causa precontractus*, or any other ree which dissolves the Marriage *a vinculo Matrimonii*, the Wife during the Husband's Life may enter, for the ds of the Act are, *no Fine, Feoffment*, &c. during the rture between them. And altho' afterwards the Hus- and Wife are divorced, yet the Feoffment was made the Coverture *between them*. And altho' the Statute *But that the same Wife*, &c. that is to be intended of who was his Wife at the Time of the Alienation; for the Husband dies, she is not then his Wife, but she is Wife to describe the Person only who shall enter; it is not said in the Statute that the Wife shall enter the Death of her Husb. but generally that she shall enter *ding to their Right and Title*; be it in the Life of the Hus- after a Divorce *a vinculo Matrimonii*, or after his Death.

(*a*) Co. Lit. 32 b. Moor 58.

L Trin.

Trin' 7 Jacobi Regis.

The Lord STAFFORD's *Case.*

Co. Ent. 577. num. 6. 2 Brownl. 248, 249.

BEtween *Thomas Malym* Plaintiff, and *Tho. Tully* Defendant, in a Replevin, which began in the Common Pleas, *Trin. 6 Jacobi, Rot.* 2341. upon the pleading the Parties demurred in Law, and upon the whole Record the Case was such. Queen *Mary* was seised of a Park called *Eſtwood* Park, within the Manor of *Thornbury*, in the County of *Glouceſter*, in Fee, and by her Letters Patents, 10 *Julii anno regni ſui* 2. granted the ſaid Park to *Henry* Lord *Stafford*, and *Urſula* his Wife, and to the Heirs of the Body of *Hen.* L. *Stafford*, by Force whereof the L. *Stafford* and *Urſula* his Wife were ſeiſed thereof accordingly, the Reverſion over expectant to the ſaid Queen *Mary*, her Heirs and Succeſſors; which Reverſion of the Fee-ſimple by the Death of Queen *Mary* deſcended to Queen *Elizabeth*. *Hill.* 3 *Eliz. Tyndal* levied a Fine to the Lord *Stafford*, and *Urſula* his Wife *come ceo*, and to the Heirs of the Lord *Stafford*, of the ſaid Park, by which Fine the Lord *Stafford* and his Wife rendred it to *Tyndal* for 25 Years: And afterwards *Henry* Lord *Stafford*, *ultimo Jun.* 7 *Eliz.* died, and *Urſula* ſurvived him and held in by Survivorſhip, and the Remainder of the ſaid Eſtate tail deſcended to *Hen.* Lord *Staff.* the Son: And afterwards Q. *Eliz.* by her Letters Patents, 10 *Jul.* 7 *Eliz.* reciting the former Eſtate, the Reverſion and Reverſions thereof to the ſaid Q. *Eliz.* her Heirs and Succeſſors expectant, the ſaid Q. *Eliz.* by the ſaid Letters Patents, and for the Sum of 53 *lib.* 18 *s.* paid by *Tho. Tyndall*, Gent. did grant to the ſaid *Thom. Tyndal Reverſionem præd' parci, &c. habend' & tenend' ſibi & hæred' de corpore ſuo legitime procreatis: Et ulterius præ-*

dict.

dicta nuper Regina Elizabetha voluit & declaravit per eaſdem Literas Patentes, q'd ſi præfat' Thomas Tyndal Hæredes vel Aſſignati ſui ad aliquod Tempus impoſterum ſolverent ſeu ſolvi facerent, aut eorum aliquis ſolveret ſeu ſolvi faceret, ad Receptum Scaccar' præd' nup' Regina Hæred' vel Succeſſor' ſuor' ad uſum ipſius nup' Regi' Hæred' vel Succeſſor' ſuor', ſummam viginti ſolidor' legalis Monetæ Angliæ pro præmiſſis, ultra præd' Summam 53 *l.* 18 *s. tunc eadem nup' Regina Elizabetha de ampliori Gratia ſua ſpeciali, ac ex certa Scientia & mero motu ſuis voluit & per eaſdem Literas ſuas Patentes pro ſe Hæredib' & Succeſſorib' ſuis conceſſit & declaravit q'd extunc idem Tho. Tyndal & hæredes ſui haberent & tenerent, ac habere, tenere, & gaudere valerent & poſſent, ſibi & hæredib' ſuis imperpetuum virtute earundem Liter' Patent' ſuar' præd' reverſionem præd' Parci cum pertinent' inter alia: Habend' tenend' & gaudend', ea omnia & ſingu' Præmiſſa cum pertinent' præfat' Tho. Tyndal hæredib' & aſſignat' ſuis:* By Force whereof the ſaid *Tho. Tyndal* was ſeiſed of the ſaid Reverſion in Tail, and he being thereof ſo ſeiſed, the Reverſion over to the Queen as aforeſaid, the ſaid *Tho. Tyndal*, 23 *Feb.* 8 *Eliz.* at the Receipt of the Exchequer at *Weſtminſter*, paid to *Tho. Gardiner*, then one of the Tellers of the Exchequer, to the Uſe of the ſaid Queen, the Sum of 20 *s.* for the ſaid Park, above the ſaid Sum of 53 *l.* 18 *s.* which 20 *s.* were then receiv'd, *prout per record' Receptionis inde in Curia Scaccarii Domini Regis nunc apud Weſtm' præd' remanen' plene liquet & apparet*, by Force whereof he was ſeiſed of the ſaid Reverſion in Fee expectant on his Eſtate Tail: And afterwards *Henry* Lord *Stafford*, 8 *Eliz.* died; after whoſe Death the ſaid Remainder deſcended to *Edward* Lord *Stafford* his Son, who, *Paſch.* 8 *Eliz.* levied a Fine to *Clark*, and others of the ſaid Park, with Proclamations, and afterwards the ſaid *Urſula*, 10 *Eliz.* died, and afterwards *Edward* Lord *Stafford* died, and *Edward* Lord *Stafford* that now is, his Son and Heir, pretending that the ſaid Reverſion in Fee did not accrue to *Tho. Tyndal* by the Payment of the ſaid 20 *s.* but remain'd in the Crown, by the ſaid *Thomas Malym* diſtrein'd the Cattle of *Tully* the Plaintiff, in the ſaid Park, who claimed under the ſaid Fine; and to enforce the Letters Patents of Q. *Eliz.* the Statute of Confirmation of Letters Patents made (*a*) 18 *Eliz.* was pleaded; which was not pertinent to this Caſe; but the principal Point of this Caſe was, Whether by the Payment of the ſaid 20 *s.* the ſaid *Tho. Tyndal* had gained the Reverſion of the Fee Simple, out of Q. *Eliz.* For if no Reverſion remained in the Queen, then the (*b*) Fine with Proclamations barred the L. *Stafford* that now is, who claimed as Iſſue in Tail; and if the Reverſion remain'd in her at the Time of the Fine, then the Fine levied by *Edward* Lord *Stafford* the Father did not bar him.

(*a*) 18 Eliz. cap. 2.

(*b*) Raym. 271. 34 & 35 H. 8. cap. 6.

And this Case was very well argued by the Serjeants, *scil.* *Hutton*, *Nichols*, *Harris* the younger, and *Houghton*, and afterw. this Term the Case was argued by all the Justices of the Bench, *scil.* *Coke* Chief Justice, *Walmesley*, *Warburton*, *Daniel*, and *Foster*. And two Objections were made against the Substance of the Grant; and two against the Form of the Grant. The Objections against the Substance were, 1. That such Condition cannot be annexed to a Thing which lies in Grant, but to a Thing which lies in Livery; and therefore it was said, that Rents, Commons, Advowsons, Reversions, *&c.* cannot be granted for Life or Years, with Condition to have Fee, but only Land which lies in Livery, for the Increase of such future Estate rather takes Effect by Livery, than by Grant; for without Livery such future Estate will not pass in case of Land, and it ought to pass *ab initio* by the first Livery; and a Man cannot grant a Rent *in esse*, or a Common, or Advowson, or (*a*) a Reversion, or any thing which lies in Grant to begin *in futuro*, as from *Michaelmas* next following, or after such an Act done, *&c.* And all the Books in the Law which speak of such Condition for Increase of an Estate, put the Case always of Land, to which Livery is requisite, 31 *Edw.* 1. *Voucher* 285. 31 *E.* 1. *Feoffments & Faits*, 119. 2 *E.* 2. *Quid juris clamat*, 38. 12 *E.* 2. *Voucher*, 265. 7 *E.* 3. 10. 10 *E.* 3. 40, 55. 10 *Ass. p.* 15 & 19. 12 *Ass. p.* 5. 32 *E.* 3. *Garr.* 30. 43 *E.* 3. 35. 43 *Ass. p.* 41. 44 *E.* 3. *Attaint* 22. 50 *E.* 3. 27. 6 *R.* 2. *Quid juris clamat*, 20. 27 *H.* 6. 7. *Plow. Com. Saye's* Case, 272. *Plow. Com.* the Lord *Lovel's* Case 487. The second Objection was, That such Condition which increases an Estate, ought always to merge the first Estate upon the Increase, and make all but as one Estate and one Grant, and therefore it ought to be annexed to an Estate for Years or Life, which so may merge on the Performance of the Condition, that all shall be but one Estate by one Grant, and not sev. and divided Estates; and theref. in all the said Books such Cond. is alw. annexed to an Estate which may merge; but in the Case at Bar the Cond. is annex. to an Estate Tail, which cannot merge (*b*) by the Access of the Fee simple to it; and such Condition was never annexed to an Estate Tail, in any Book or Precedent which can be shewed. As to the Objections to the Form of the Grant, the first was, That after the Queen had granted the Reversion to *Thomas Tyndal*, and to the Heirs of his Body, she now upon the *Contingit* grants to him *prædictam Reversionem* to him and his Heirs: In which it was said, the Queen was deceiv'd in her Grant, for *prædicta reversio*, is that whi. the Q. had granted bef. to *T. Tyndal* in Tail, which now she can't grant in Fee-simple, for *inten' Regin' non conv' cum lege*, for that whi. she hath granted first in Tail, she

(*a*) Plowd. 155. b. 156. a. 197. a. Cr. El. 152. 1 Leon. 171.

(*b*) 3 Co. 61. a.

ſhe cannot afterwards grant in Fee, and the Eſtate Tail was granted abſolutely, and cannot be merged or deſtroyed by the ſaid Grant upon the ſaid Contingency. The ſecond Objection, as to the Form of the Grant, was, That the ſaid Grant ſounded only in Covenant, which in the Caſe of Inheritance ſhall not transfer it in the King's Caſe, as it may in Caſe of a Chattel, and for that the Words are, That the Queen wills and declares, That if the ſaid *Tho. Tyndal* ſhall pay 20 *s.* then the ſaid Queen grants, That the ſaid *Thomas Tyndal* and his Heirs ſhall have the ſaid Reverſion; ſo that the Reverſion itſelf is not granted, but it is a Grant which ſounds in Covenant, that he ſhall have the ſaid Reverſion, But it was reſolv'd by the whole Court upon ſolemn Argument, That the ſaid Grant was good. (†) And as to the two firſt Objections, it was reſolv'd, That ſuch Grant with a Condition precedent may be made, as well of Things which lie in Grant, as of Land which lies in Livery, and may be (‡) annexed as well to an Eſtate Tail, which cannot be merged, as to an Eſtate for Life, or Years, which may be merged by the Acceſs of a greater Eſtate; but ſuch Increaſe of an Eſtate by Force of a Condition precedent, ought to have four Incidents; 1. (*) It ought to have a particular Eſtate, as a Foundation upon which the Increaſe of the greater Eſtate ſhall be built. 2. That ſuch particular Eſtate ought to continue in the Leſſee or Grantee, 'till the Increaſe happens. (*) 3. It ought to veſt at the Time the Contingency happens, or otherwiſe it ſhall never veſt. 4. The Particular Eſtate and the Increaſe ought to take Effect by one and the ſame Inſtrument or Deed, or by ſeveral Deeds deliver'd at one and the ſame Time, and not by ſeveral Deeds deliver'd at ſeveral Times. As to the firſt, it is proved by all the ſaid Books, that there ought to be a precedent Eſtate, upon which the Eſtate, as upon a Foundation, may encreaſe: But *Coke* Chief Juſtice ſaid, That ſuch Foundation ought to be permanent and not revocable at the Will of the Grantor or Leſſor; and therefore if a Man grants an Advowſon to another at Will, upon Condition that if he do ſuch a Thing that he ſhall have Fee, in that Caſe the Eſtate at Will is not any ſuch Foundation as the Law requires to ſupport an Increaſe of an Eſtate of Freehold or Inheritan. for the Grantor may determ. the Will, bef. the Condit. perfor. and ſo avoid his own Grant, and a Leaſe at Will can't ſupport a Remainder over. And if a Man grants an Advowſon, or a Rent, *&c.* for Years upon Condit. that if the Leſſee pays 10 *s.* within one Year, that he ſhall have for Life, and if after the Year he pays 20 *s.* that he ſhall have Fee; the Leſſee pays the 10 *s.* within the Year, and after the Year he pays the 20 *s.* according to the Condition, yet he ſhall have but for Life, for the Eſtate for Life at the Time of the Grant, was but in Conting. whi. is not a Founda. upon whi. a greater can incr. for a Poſſib. can't incr. upon a Poſſib. and the Eſt. of Fee

(†) Co. Lit. 217. b.

(‡) 2 Co. 61. a.

(*) 2 Brownl. 251.

(*) Plowd. 485. a. 489. a.

Co. Lit. 217. b.

Cr. Jac. 462. Cr. Car. 577. 10 Co. 50. b. 1 Roll. Rep. 321. Co. Lit. 25. b. 1 Co. 156. b. 1 Sid. 452.

ſimple cannot increaſe upon the Eſtate for Years, for that is merged by the Acceſs of the Eſtate for Life, as ſhall be afterwards ſaid. As to the ſecond, the Privity of Eſtate ought to (*a*) continue; and that is proved by the ſaid Caſe of the Lord *Lovell*: And therefore if the Leſſee for Life, or Years, or the Donee in Tail who has ſuch a Condition annexed to his Eſtate, aliens before the Condition performed; or if Leſſee for Life, or Years, ſurrenders to the Leſſor, he ſhall never take Benefit of the Condition afterwards, for the Privity of Eſtate in ſuch Caſe ought to continue, for the Increaſe of the Eſtate ought to enure upon the particular Eſtate, as upon a Foundation; and therefore if in ſuch Caſe the Leſſee for Life or Years, or the Donee aliens all his Eſtate, and takes back an Eſtate, and afterwards performs the Condition; yet nothing ſhall thereby accrue to him, becauſe by the abſolute Alienation, the Privity was once abſolutely deſtroyed, which can't by any Repriſal of an Eſtate be revived: As if one Coparcener after Partition makes a Feoffm. in Fee, and takes back an Eſtate to herſelf again, and her Heirs, yet the Privity of the Eſtate to have (*b*) Aid to deraign the Warranty Paramount is deſtroyed, 11 *H.* 4. 22. *b. Vide* 38 *E.* 3. 20. *b*, So if Tenant by Homage (*c*) anceſtrel makes a Feoffment in Fee, and takes back an Eſtate to him in Fee, he ſhall not hold by Homage Anceſtrel. *Little. lib.* 2. 33. *b.* But if Leſſee for Life, *&c.* grants his Eſtate upon Condition, and enters for the Condition broken, and afterwards performs the Condition, there peradventure the Fee ſhall accrue to him; for the Poſſibility was not abſolutely deſtroy'd and when he enters for the Condition broken, he is in his old Eſtate; and that the particular Eſtate ſhould continue to all Reſpects is not neceſſary; but if ſuch a Privity of Eſtate continues as is capable of an Increaſe, it is ſufficient. And therefore, if ſuch Leſſee for Life makes a Leaſe for Years, or if Leſſee for Years makes a Leaſe for a leſſer Term; or if ſuch Donee makes a Leaſe for his own Life, or for Years, yet for the Privity of Eſtate which continues in them, they are capable of an Increaſe of an Eſtate: But if ſuch Tenant in Tail makes a Leaſe for the Life of another, there he is not capable of any Increaſe becauſe he has gain'd a new Reverſion in Fee, and the firſt Privity doth not remain; and yet in ſuch Caſe if the Leſſee for Life dies, there the firſt Privity of Eſtate is revived. So if a (*d*) Man makes a Gift to one to have and to hold to him, and his Heirs of the Body of his Wife begotten, with ſuch Condition *ut ſupra*, and afterwards the Wife dies without Iſſue, ſo that now he is become Tenant in Tail after Poſſibility, in that Caſe, although the Eſtate be changed, yet foraſm. as the Privity remains, he may by the Perform. of the Condit. have Fee after. So if a (*e*) Lease be made to two with Condit. to have Fee, and one dies, the Survi. may perform the Condit. and have Fee. But if the ſ

(*a*) 35 H. 8. Br. Expoſit. de parols 44. 1 Co. 154. b. 8 Co. 145. b. Plowd. 483. b. Cr. Car. 359.

(*b*) Br. Aid 46. 1 Roll. 182, 183. Br. Perempt. 10. Br. Coparcen. 5. Br. Counterplea. de Aid 24. Fitz. Counterplea. de Aid 14.

(*c*) Lit. Sect. 147. Co. Lit. 193. a. 202. b.

(*d*) 2 Brownl. 251. Raymond 414.

(*e*) 2 Brownl. 251.

Jointenants have made Partition of the Term, the Condition is destroy'd; for the Estate in Fee ought to increase to them jointly, and not in Severalty. And in the Case at Bar, altho' *T. Tyndal* had died before the Performance of the Condition, his Heir of his Body might have perform'd it, for altho' the Persons were altered, yet the same Estate continued; and this Power to perform the Condition descended (*a*) to his Heir, as an Inheritance annexed to the Foundation which descended to him, and he, after the Condition perform'd, should have the Reversion in Fee *quodam modo* by Descent, as in *Shelley*'s Case, in the First Part of my *Reports*. And altho' it is requisite that Privity of Estate should continue; yet it is not requisi. that the Increase should merge the partic. Estat. for if a Man makes a Lease for Life, the Rem. for Life, or in Tail, on Condit. that if the first Lessee doth such a Thing, that he shall have Fee; in that Case by the Performance of the Condition he shall have Fee, and yet it shall not merge the Estate for Life, *quod fuit concessum per Curiam*. And if a Man makes a Lease for Years, on Condit. that if the Lessor (*b*) ousts him within the Term, that he shall have Fee; in that Case if the Less. ousts him, now the Interest of the Term is turned into a Right; and yet the Lessee in such Case shall have Fee, for two Reasons. 1. Because it is the Act and Wrong of the Lessor himself, whereof he shall not take Advantage. 2. *Eo instante* that the Lessor ousts him *eo instante* the Lessee hath Fee, and the Title of the Lessee is by Force of the Condition, which is puram. the Ouster: and therew. agrees 6 *R.* 2. (*c*) *Quid juris clamat.* 20. And that a Possess. in an Instant is suffici. to supp. the Increase of the Fee, appears in 12 *E.* 2. *Voucher* 265. A Man (*d*) makes a Lease for Years on Condit. that if the Lessor doth not pay to the Lessee 100 Marks at the End of the Term, that he shall have Fee, there the End of the Term consists on an Instant of Time. And if the Estate Tail of the L. *Stafford* had determ. for Want of Issue, and *Ursula* had died, so that the Revers. of *T. Tyndal* had come in Possess. yet forasm. as the Privi. of the Estate continueth, altho' the Quality of the Reversi. is altered to a Possess. the Condit. remaineth. But there is a Diffe. betw. the Continu. of the Privity of the Estate of the (*e*) Lessor or Grantor, and the Privity of the Estate of the Lessee or Grantee; for the Privity of the Estate on the Part of the Lessor needs not be continued; for although the Lessor or Grantor alienes his Reversion, or is attainted, *&c.* yet the Condition remains; for by no Act that he can do can he frustrate or derogate from his Grant; and therewith agree 31 *Edw.* 1. *Fines & Faits*, * 119. 6 *R.* 2. *Quid juris clamat*, (*f*) 20. and *Plowden*'s *Com.* in the said Case of the Lord *Lovel*. But if a Lessee for Years with Condition to have Fee accepts a Release from the Lessor to him for his Life, or in Tail, and afterw the Condit. is perform. he shall never have Fee, because

(*a*) 2 Roll. Rep. 484.

(*b*) Co. Lit. 217. a.

(*c*) Co. Lit. 217. a. 378. b. Plowd. 262 34 b. 487. a. Dyer 209. pl. 21. Perk. Sect. 729. 1 And. 316. Cr. Jac. 698. 1 Jones 58, 59. Godb. 105. 1 Rol. Rep. 478, 485. 21 H. 7. 11. b. Goldsb. 6. 1 Co. 84. b. 2 Brownl. 22, 294.

(*d*) Co. Lit. 217. a.

(*e*) Plowd. 486. b. 487. a.

(*f*) Plowd. 387. a. * Co. Lit. 216. b.

Eſtate for Years, which is the Foundation upon which the Fee ſhould increaſe, is, by his own Acceptance of a greater Eſtate, merged, and has no Continuance: As if Leſſee for Years without Impeachment of Waſte (*a*) takes Confirmation for Life, the Privilege, which was annexed to the Eſtate for Years, is loſt, 5 *H.* 5. 9. *a.* 3 *Ed.* 3, 44. *a. b.* in *Mary de la* * *Idles* Caſe. 28 *H.* 8. *Dyer* 10. *b.* &c. And it was reſolv'd, that if Q. *Eliz.* had died before the Cond. perform'd that yet *Tyndal* might have perfor. the Cond. and if Q. *Eliz.* under her Great Seal had refuſed to take the ſaid Money, yet if *Tyndal* had tendred it at the Receipt of the Exchequer, that he had gained the Fee-ſimple, for the Queen by no Means could countermand or hinder the Increaſe of the Eſtate in ſuch Caſe.

(*a*) Dyer 10. pl. 37. 11 Co. 83. b. 5 Co. 13. a. 3 Bulſt. 136. 19 H. 6. 23. a. Poph. 194. Latch. 269.

* 11 Co. 83. a. Poph. 194.

As to the Third, It was reſolv'd, That if the Condition had been that when *Tyndal* ſhould pay to *I. S.* 20 *s.* that he ſhould have Fee, that preſently by the Payment by Operation of Law, the Fee would be (*c*) diveſted out of the Queen, and veſted in *Tyndal*, and that for Neceſſity, for if it ſhould not veſt at the Time of the Condition performed, it ſhould never veſt; and therefore if Office, or Petition, *Monſtrans de droit*, or other thing ſhould be requiſite, it would make the Queen's Grant void, and diſable the Queen to make ſuch Grant, and therewith agrees *Plow. Com.* in the ſaid Caſe of the L. *Lovel*; for there it is ſaid, when the Cond. is perfor. the Fee-ſim. ſhall be immed. out of the K. witho. Petit. or *Monſtra' de droit*, or oth. Circumſt. for if he ought to ſtay to uſe ſuch Circumſtances, then it will not veſt preſently; and if it will not veſt preſently, *ergo* it will never veſt; for if an Eſtate cannot be enlarged at the Time of the Enlargement appointed, it ſhall never be enlarged; and theſe are the Words of the Book; and therefore for Neceſſity the Fee-ſimple ſhall paſs in the Caſe at Bar out of the Queen without any Circumſtance; for the Law will never require Circumſtance when it will ſubvert Subſtance. And therefore there is a notable Caſe in 49 *E.* 3. 16. *a. b.* where the Caſe was, That *Iſabel* (*d*) *Goodcheap* was ſeiſed in Fee of a cert. Houſe in *London*, and by her Will in Writing and enrolled, deviſed the ſaid Houſe held of the King, to *Rich. Goodcheap*, to him, and to the Heirs of his Body: So that if he died without Iſſue, that the ſaid Lands ſhould be ſold by her Executors, or Executors of Executors, &c. and made *W. D.* and *W. W.* and *I de T.* her Executors, and died without Heir; *Richard Goodcheap* died without Iſſue, by which the Houſe eſcheated to the King, and afterwards *I* one of the Executors died, *W. W.* refuſed, and *W. D.* ſold, &c. And there it is made a Queſtion whether the Sale by one Executor be good, or not? But it is agreed by all, That if the Sale be good, it ſhall diveſt the Land out of the King, and the Reaſon is for Neceſſity of Law, for if the Sale doth not diveſt the Land at the Time of the Sale, no Sale ſhall be made at all, and the Execu-

(*c*) Plowd. 489. a. Co. Lit. 354. b. 2 Co. 53. b.

(*d*) 2 Brownl. 252. 2 Co. 53. a. b. Lit. Rep. 123. Godb. 443. Cr. Eliz. 640. Br. Eſcheat 32. Br. Devi. 10. Fitz. Deviſe 8 Plowd. 259. a. 4 Co. 58. a. Raym. 83. 29 Aſs. 31. Hard. 13, 14. Swinb. 335. 2 Rol. Rep. 351.

tors, who have but a Power, cannot have a Petition, *Monstrans de droit*, or other Remedy.

As to the fourth Incident, it was resolv'd, That it ought to be by one and the same Deed or Grant, or by two Deeds deliver'd at (a) one Time, which is all one in Effect; for, (b) *Quæ incontinenti fiunt inesse videntur*; and the Reason thereof is, because the Foundation, *scil.* the particular Estate, and the Increase of the Estate thereupon is but one Grant to take Effect out of one and the same Root, altho' it vests at several Times, yet when it is vested, it has its Vigour and Force of one and the same Grant; and therefore it is well said in 27 *H.* 6. 7. *a.* (c) that when he has perform'd the Condition he has Fee from the Time of the Commencement of the Lease, as by one and the same Grant, and as one and the same Estate.

(a) Co. Lit. 217. b
(b) 2 Brownl. 252, 2 Brownl. 252, 2 Co. 71. a. Co Lit. 272. a.
(c) B. Relation 5

As to the first Objection against the Form of the Grant, *scil. prædictam reversionem*, to construe it to extend to the Estate Tail granted before to *Tyndal*, (which the Queen cannot grant again) and not to the Reversion of the Fee; (which the Queen may grant, and which is mention'd before) will be a (d) Construction tending in great Dishonour to the Queen, and in great Damage and Disenherisin of the Subject: In Dishonour to the Queen for three Causes; 1. To have her Grant under the Great Seal by captious and nice Constructions avoided; 2. To presume such Ignorance in the Queen (who was a wise, learned and most excellent Princess, and the Phœnix of her Sex) that she intended to grant that which she could not grant, and not that which she could. 3. That the Queen (as it was objected) could not make such Grant *in futuro*, when a Subject might do it without Question; therefore *a fortiori*, the Queen might do it in such Case. Also it would tend to the Damage of the Subject who shall have the King's Charter under the Great Seal, but by a nice and captious Construct. he shall lose the Land contained therein; which will sometimes tend to the Ruin of him and his Posterity; and the Cases of Sir *John* (e) *Molyns*, the L. (f) *Chandos*, and the E. of *Rutland*, were affirmed for good Law. But, Note, the Q. grants not only *præd' reversion'* but also *omn' & sing' præmiss' &c.* which Words make this Point clear. And as to the last of the said two Objecti. it was resol. *per tot' Cur'*, That the Words were suffici. to pass the Inherit. of the Land, for to pass a future Estate upon a Conting. Words *in futu'* are apt and suffi. enough, as in all Chart. and Let. Patents of Lands, the Clause of Grant of Liber. and Franch. are all with such Words in Effect, as these are, because they are conting. and *de fut'*. And the (b) Invent. of this Grant to *Tyndal* was commend. by the Justi. for when the L. *Stafford* was Ten. in Tail the (i) Reversion to Q. *Mary*, if the Queen had granted the whole Fee-simple to *Tyndal*, then by a com. Recov. or Fine levied, the L.

(d) 11 Co. 11. b.
(e) 6 Co. 5. b. 6. a. 11 Co. 1. b.
(f) 6 Co. 55. a. b. 56. a. 11 Co. 11. b.
(g) 8 Co. 55, 56. 11 Co. 11. b.
(b) 2 Brownl. 253.
(i) 34 & 35 H. 8. cap. 20.

Staffor.

Stafford might have barred his Iſſues; and by a common Recovery the Reverſion to *Tyndal* in Fee, which was neither the Queen's nor *Tyndal*'s Intention, but the Purpoſe was, that it ſhould be in the Power of *Tyndal*, and the Heirs of his Body, to hold and reſtrain the L. *Stafford* and the Heirs of his Body, that they ſhould not alien or bar his Reverſion in Tail, or by taking the Fee-ſimple out of the Crown by the Performance of the Condition to enable them to alien. But *Coke*, Chief Juſtice in his Argument mov'd a Queſtion on the Statute of (*a*) 34 *H.* 8. *c.* 20. That if the Lord *Stafford* and his Wife had ſuffered a common Recovery with Voucher, if that ſhould not bar the Reverſion which *Tyndal* had in Tail, the Reverſion in Fee being in the Crown: And thereupon he conſider'd the Words of the ſaid Act, The Preamble of which ſeems to provide for the Heirs of the Bodies of the King's Donees. And the Queſtion mentioned in the Preamble is, *Whether ſuch feigned and untrue Recoveries againſt ſuch Tenant in Tail*, &c. *ſhould after the Death of the Tenant in Tail, bind the Heirs in Tail, or not:* And the Body of the Act is, *For the plain Declaration whereof, and to avoid and extinct from henceforth Diverſity of Opinions in ſuch Caſes, Be it ordained and enacted, that no ſuch feigned Recovery, hereafter to be had by Aſſent of Parties, againſt any ſuch Tenant in Tail of any Lands*, &c. *whereof the Reverſion or Remainder at the Time of ſuch Recovery had, ſhall be in the King, ſhall bind or conclude the Heirs in Tail, whether any common Voucher be had in any ſuch feigned Recovery or not, but that after the Death of every ſuch Tenant in Tail*, &c. *the Heirs in Tail may enter*, &c. So that by the Letter of the Act no Remedy is provided for him in Reverſion or Remainder in Tail, altho' the Reverſion of the Fee be in the King. But yet the Chief Juſtice held, that by neceſſary Conſequence (*b*) ſuch Reverſions and Remainders in Tail are preſerved by the ſaid Act: For when there is Tenant in Tail, the Remainder in Fee, and Tenant in Tail ſuffers a common Recovery, the Reaſon of the Bar of the Eſtate of him in the Remainder who is a Stranger to the Recovery is, by Conſequence, becauſe the common Recovery bars the Eſtate of the Tenant in Tail, who is Party to the Recovery, and by Conſequence, all Reverſions and Remainders of common Perſons expectant thereupon: But when the Act of 34 *H.* 8. provides, That no common Recovery had againſt Tenant in Tail, who is Party to the Recovery, ſhall bar his Iſſues when the King has the Reverſion, *&c.* thereby *incluſive* the Act preſerves the Reverſions and Remainders in Tail of the King's Grant, for they cannot be barred, but when the Eſtate Tail, upon which they depend, is barred; and that is the Reaſon that when Tenant in Tail is in of another Eſtate, and ſuffers a common Recovery as Tenant, it ſhall not bar

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(*a*) Co. Lit. 372. b. 2 Co. 15. b. 34 & 35 H. 8. c. 20. 30 Co. 37. a. 1 Anderſ. 46, 141. 2 Co. 52. a. 6 Co. 55. a. Hob. 299. 2 Rolls Rep. 417. Moor 115, 195. 1 Anderſ. 46, 47, 142, 143, 171. Cr. Car. 430. Plowd. 555. a. Yelv. 149. Noy 132. Co. Lit. 335. a. 1 Leon. 85. 3 Leon. 57. 4 Leon. 40. Benl. in Kelw. 213. a. b. O. Ben. 32. Benl. in Aſh. 26. N. Benl. 223. pl. 254. 2 Rolls Rep. 108. Raym. 349. Cr. Eliz. 595.

(*b*) Co. Lit. 372. b. 2 Rolls. Rep. 68.

any Reverſion or Remainder, becauſe the ſame ſhould bar the Eſtate of the Tenant in Tail, who is Party to the Recovery; for,(a) *Q'd non valet in principali in acceſſoria ſeu conſequenti non valebit, & quod non valet in magis propinquo, non valebit in magis remoto.* And if the Lord *Stafford* might have barred the Reverſion in Tail of *Tho. Tyndal* before the Condition perform'd, the Invention of the ſaid Grant had fail'd of its final Purpoſe: For which Cauſe it ſeemed to the Lord Chief Juſtice, that the ſaid Act preſerves the ſaid Reverſion of the ſaid *Tho. Tyndal*; *quod fuit conceſſum per totam Curiam.* Laſtly, it was reſolv'd *per totam Curiam*, That if the (b) Reverſion in Fee had remained in the Crown, That the Fine levied by the ſaid *Edward* Lord *Stafford*, the Father, had not barred the Lord *Stafford* that now is, but that he might enter according to the Reſolution in (c) *Notley*'s Caſe, *Paſch.* 31 *Eliz. in Communi Banco, & præcipue* by Reaſon of theſe Words in the ſaid Act of 34 *H.* 8. *The ſaid Recovery, or any other Thing or Things hereafter to be had, done, or ſuffered, by or againſt the ſuch Tenant in Tail, to the contrary notwithſtanding.*

(a) 2 Brownl. 253.

(b) Mo. 115, 468. Ben. in Kel. 213. Cr. El. 595, 612. Cr. Car. 430. 4 Leon. 40. 1 Anderſ. 46.

(c) Hob. 333. Co. Lit. 373. 2. Raym. 323, 324. Sav. 105.

Trin.

Trin' 7 Jacobi *Regis.*

WYAT WILD's *Case.*

8 Brownl. 180.

IN a *Replevin* between *William Wood*, Plaintiff, and *William Norton*, Esq; Defendant, upon taking of his Sheep at *Croydon* in the County of *Surrey*, in a Place called *Norwood*; The Defendant said, That the Place where, *&c.* doth contain 200 Acres, Part of the Manor of *Croydon*, and entituled himself to have Common there, and avowed for Damage feasant. The Plaintiff, in Bar of the Avowry, said That before and at the Time of the taking, he himself was, and yet is seised of five Acres of Land in *Croydon* aforesaid in Fee, and that he and all those whose Estate he has in the said five Acres *a tempore cuj' &c.* have used to have Common of Past. in the said 200 Acres for all his Cattel commonable, upon the said five Acres of Land, levant and couchant at all Times of the Year, as to the said five Acres of Land appertaining; for which Cause he put in his Sheep, *&c.* To which the Defendant said, That before the said *William Wood* had any thing in the said five Acres of Land, one *Wyat Wild* was seised of a Messuage and 40 Acres of Land in *Croydon* aforesaid, whereof the said five Acres were Parcel, in Fee, and that the said *Wyat*, and all those whose Estate he had in the said Messuage, and forty Acres of Land, whereof, *&c. a tempore cuj', &c.* had Common of Pasture in the said 200 Acres for all his Cattle commonable upon the said Messuage, and forty Acres of Land, whereof, *&c.* levant and couchant, as to the said Messuage and forty Acres of Land appertaining, and the said *Wyat* so seized, of the said five Acres enfeoffed one *John Wood* in Fee, whose Estate the said *William Wood* before the Time of the taking, *&c.* had, *Idemque Willielmus Wood colore inde clam' Commun' pastu'* in the said 200 Acres, *&c. pro omnib' aver' suis Communic' sup' præd' quinq' acr' ter'* lev. and couchant,

couchant, *&c.* put in his Cattel, and he took them as Damage Feasant, *&c.* upon which the Plaintiff demurr'd in Law. And the last Term and this Term this Case was argued by the Serjeants at the Bar, and now this Term it was argued at the Bench by all the Justices, *sc. Coke* Ch. Just. *Walmesley*, *Warburton*, *Daniel*, and *Foster*: And in this Case two Points were resolved. 1. That (be the said (*a*) Common appendant or appertenant) the Common in the Case at Bar is apportionable. 2. That Pleading thereof was sufficient. As to the first it was well agreed that Comm. appendant was of Common Right, and severable, and altho' the Commoner in such Case purchases Parcel of the Land in which, *&c.* yet the Common shall be apportioned, but in such Case Common appertenant, and not appendant, by (*b*) Purchase of Parcel of the Land in which, &c. is extinct for the Causes and Reasons given in *Terringham's* Case, all which was affirmed for good Law by the whole Court. And it was strongly urged, that Common appertenant shall not be severable in the Case at Bar for divers Reasons. 1. Because this Common appertenant wholly belonged to a House and 40 Acres of Land by Prescription; and he by his own Act cannot make this entire Thing several. 2. The Feoffee of Parcel shall not have Common, because the Prescription fails, for no Common was ever appertenant to that Parcel, but to the Messuage and all the Land. 3. Common appertenant is a Thing against Common Right, and therefore by the Act of the Party shall be no more severed or divided, than a Condition or *Nomine pœnæ*, or any other Thing against Common Right. As to that it was answered and resolved, That it appears by the Prescription, that the said Common is severable, for the Prescription is to have Common in the Land, in which, *&c.* to be taken by the Mouths of his Beasts which are (*c*) levant and couchant on the Land, to which, *&c.* and that extends to the whole, and to every Parcel, and it can be no more Damage to the Tenant of the Land in which, *&c.* after the Severance, than it was before, for no other Beasts can pasture there, but those which are levant and couchant on the Land, to which, *&c.* But if he who has Common appertenant (*d*) purchases Parcel of the Land in which, *&c.* all the Common is extinct; Or, if he takes a (*e*) Lease of Parcel of the Land, all is suspended, because it is the Folly of the Commoner to intermeddle with Part of the Land in which *&c.* which belongs not to him: But when the Commoner intermeddles but only with his own Land, by Alienation thereof, that shall not in such Case turn to his Prejudice, for that is not against any Rule of the Law, as the other Case, when he purchases Part of the Land, in which, *&c.* because his Common appertenant was against Com-

(*a*) Hob. 235. Noy 30. 1 Jones 397. 1 Roll. 234.

(*b*) Winch. 45. Hob. 235. 4 Co. 38. a. Co. Lit. 122. a.

(*c*) Cro. Car. 482. Noy 30. Hob. 235.

(*d*) 1 Anders. 159. 1 Leon. 43, 44. Goldsb. 53. Winch. 45. Noy 30. Co. Lit. 122. a. 4 Co. 38. a.

(*e*) 9 Co. 135. a. Co. Lit. 148. b. 1 Rolls 938.

Common Right; and he cannot common in his own Land which he has purchaſed. And it will be a great Inconvenience, If by the Alienation of Parcel the Alienee ſhall loſe the Common which belongs to him, for then the Alienor ſhall loſe his Common alſo, for by the Reaſon which has been made, *Wyat Wild* can't preſcribe to have Common to the Houſe and 35 Acres, becauſe the Common was entirely appertenant to the Meſſuage and 40 Acres, and if the Law ſhould be ſuch, all Common appertenant in *England* would be (*a*) deſtroyed (which would be againſt the Commonwealth) for no Land continues in ſo intire a Manner, every Acre together with another, as it has been *ab initio*, but for Preferment of younger Sons, Advancement of Daughters, Payment of Debts, or other neceſſary Conſiderarions, Part has been ſevered; and therefore this Caſe is not like a Condition, or *Nomina pœnæ*, which are entire, and not ſeverable by the Act of the Parties, but is like a Rent reſerved on a Leaſe for Years: And therefore, If a Man makes a Leaſe of three Acres, each of equal yearly Value, rendring 3*s*. Rent, and the Leſſor grants the Reverſion of one Acre, and the Tenant attorns, the Grantee ſhall have 12*d*. Rent, for altho' it was one Leaſe, one Reverſion, and one Rent, yet that was incident to the Reverſion, which was ſeverable, and the Rent ſhall wait upon the Reverſion, and upon every Part of it. So in the Caſe at Bar, altho' at the Beginning there was but one Common attendant upon one Tenancy; yet foraſmuch as it is attendant upon the Tenancy which is ſeverable, and upon every Part of it, the Alienee of Part of the Tenancy ſhall have Common. So if he who has ſuch Comm. apperten. to Land, leaſes Part of the Land to another, the Leſſee ſhall have Common for the Beaſts levant and couchant; and if an Advowſon be appendant to a Manor which deſcends to divers Coparceners, and the Coparceners make Partition of the Manor to which, *&c.* without ſpeaking of the Advowſon, the Advowſon, notwithſtanding the Diviſion and Severance of the Manor to which, *&c.* remains appendant, 13 *Ed.* 3. *Quare Imp.* 58. 19 *Ed.* 3. *ibid.* 59. 17 *Ed.* 38. 43 *Ed.* 3. 35. 13 *E.* 2. *Quare Imp.* 170. 2 *H.* 7. 5. *Vid.* 4 *Eliz. Dy.* 213.

(*a*) Noy 30. 4 Co. 38. a. Hob. 235.

Moor 114. Co. Lit. 148.

Moor 463.

Tri

Trin' 7. Jac. Rot. 2629.

VINYOR's *Case.*

WIllielmus Wyld nuper de Themilthorpe in comitatu prædicto Yeoman, alias dictus Willielmus Wyld de Themilthorpe in Comitatu prædicto Yeoman, ſummon' fuit ad reſpondendum Roberto Vinyor, de placit' quod reddat ei viginti libras quas ei debet & injuſte detinet, &c. & unde idem Robertus per Thomam Vinyor, Attornatum ſuum dicit, quod cum prædictus Willihelmus quintodecimo die Julii, anno regni Domini Regis nunc Angliæ, Franciæ, & Hiberniæ ſexto, apud Themilthorpe, per quoddam ſcriptum ſuum obligatorium conceſſiſſet ſe teneri eidem Roberto in prædict' viginti libris, ſolvend' eidem Roberto cum inde requiſitus fuiſſet, prædictus tamen Willihelmus, licet ſæpius requiſitus, prædictas viginti libras eidem Roberto nondum reddidit, ſed ill' ei hucuſque reddere contradixit, & adhuc contradic' unde dic' quod deteriorat' eſt & damnum habet ad valenciam decem librarum, et inde produc' ſectam, &c. Et profert hic in Cur' ſcriptum prædictum quod debitum præd' in forma prædicta teſtatur, cujus datus eſt die & anno ſupradict' &c. Et prædictus Willihelmus per Johannem Buſſel Attornat' ſuum ven' & defend' vim & injuriam quando, &c. & petit auditum ſcripti prædicti, & ei legitur, &c. petit etiam auditum conditionis ejuſdem ſcripti, & ei legitur in hæc verba. **The Condition of this Obligation is ſuch, that if the abovebounden** William Wyld **do and ſhall from Time to Time, and at all Times hereafter, ſtand to, abide, obſerve, perform, fulfill, and keep, the Rule, Order, Judgment, Arbitrament, Sentence, and final Determination of** Wil. Rugge, Eſq; **Arbitrat. indifferently named, elected, and thoſ. as well of the Part and Behalf of the ſaid** W. Wyld, **as of the Part and Behalf of the abovenamed** Robert Vinyor, Norff. ſs.

nyor, to rule, order, adjudge, arbitrate, and finally determine, all Matters, Suits, Controversies, Debates, Griefs, and Contentions heretofore moved and stirred, or now depending between the said Parties, touching or concerning the Sum of two and twenty Pence, heretofore taxed upon the said William Wyld for divers Kind of Parish Business within the said Parish of Themilthorpe; so as the said Award be made and set down in Writing, under the Hand and Seal of the said William Rugge, at or before the Feast of St. Michael the Archangel next ensuing after the Date of these Presents, That then this present Obligation to be void and of no Effect, or else the same to stand, abide, remain, and be in full Force, Power, Strength, and Vertue. Quibus lectis & auditis idem Willihelmus Wyld dic' quod prædictus Robertus actionem suam prædictam versus eum habere non debet, quia dic' quod arbitrator prædictus post confectionem scripti & ante prædict' festum sancti Michaelis Archangeli, in conditione prædicta superius spec', non fecit aliquod arbitrium in scripto sub manu et sigillo ejusdem arbitratoris, inter ipsum Willihelmum & præfatum Robertum, de & super præmiss' prædictis in conditione prædict' superius spec', secundum formam & effectum conditionis illius: Et hoc paratus est verificare, unde petit judicium si prædictus Robertus actionem suam prædictam versus eum habere debeat, &c. Et prædict' Robertus dicit, quod ipse per aliqua præallegata ab actione sua prædicta habend' præclud' non debet, quia dicit quod prædictus Willihelmus Wyld post confectionem scripti præd' & ante prædictum festum sancti Michaelis Archangeli tunc proxim' sequent', scilicet, vicesimo secundo die Augusti ann: reg' Domini Regis nunc Angliæ, &c. sexto supradict', apud Themilthorpe præd' per quoddam scriptum suum, quod idem Robertus sigillo præd' Willihelmi signat' hic in Cur' profert, cujus dat' est eisdem die & anno, recitando q'd cum ipse idem Willihelm' tunc stetit obligat' præfat' Roberto per nomen Rob. Vinyor, in uno script' obligator' in summa viginti lib' cum conditione in eodem scripto, pro performatione & preimplemento arbitrii, regulæ, ordinis, judicii, sententiæ, & finalis determinationis Willihelmi Rugge armigeri, arbitratoris, electi Anglice **chosen**, tam ex parte prædict' Willihelmi Wyld, quam ex parte supra-nominati Roberti Vinyor, prout in dicto scripto obligatorio plenius apparuit & apparere potuit, tunc idem Willihelmus intendens revocationem inde per idem script' revocationis, revocavit, & abrogavit, Anglice **did call back**, omnem authoritatem quamcunq; quam idem Willihelm' Wyld præd' script' obligator' dedisset & commisisset præfat' W. Rugge arbitrat' suo: Et extunc total' & penit' deadvocavit, Anglice, **disallowed**, & vacuum tenuit tot' & quic-

quicquid præd' *Willihelm' Rugge* poſt deliberationem ejuſdem ſcripti revocationis ſibi faceret, in & circa dictum arbitrium, regulam, ordinem, Judicium, arbitramentum, ſententiam, & determinationem, de omnibus materiis, ſectis, Controverſiis, debat' gravaminib' & contentionib' tunc præantea mot' ſive ſuſcitat' aut tunc dependent' inter dictas partes, tangent' vel concernent' ſumm' viginti & duor' denarior' taxat' ſuper dict' Willihelm' Wyld, ſecund' præd' ſcript' obligator' prout fuit in eodem mentionat' & declarat', prout per ſcript' illud revocat' plenius apparet, et hoc paratus eſt verific' : unde ex quo præd' Willihelm' Wyld poſt confection' ſcripti, præd' & ante præd' feſtum ſancti Mich' Archangeli tunc proxim' ſequent' in form' præd' exoneravit et abrogavit arbitrator' præd' de omni auct' arbitrandi de & in præmiſſ' in conditi' præd' ſuperius ſpec' cont' form' & effect' condition' illius & ſubmiſſion' in eadem mentionat', idem Robertus petit judicium & debitum ſuum præd' una cum damnis ſuis occaſione detentionis debiti illius ſibi adjudicari &c. cum hoc q'd idem Robertus verific' vult, q'd præd' ſcript' obligator' hic in Curia prolat' & præd' ſcript' obligator' in præd' ſcripto revocation' ſpec' eſt unum & idem ſcript', & non al' neq; diverſ' &c. Et præd' Willihelm' Wyld dic' q'd præd' pl'it' præd' Roberti ſuperius replicand' pl'tat' min' ſufficiens in lege exiſtit ad ipſum Robertum actionem ſuam præd' verſus eund' Willihelmum habend' manutenend' quodq; ipſe ad pl'itum illud modo & form' præd' placitat' neceſſe non habet nec per legem terræ tenetur reſpondere : Et hoc paratus eſt verificare, unde pro defectu ſufficient' replicat' in hac parte idem Willihelm' pet' judicium, & q'd præd' Robertus ab actione ſua præd' verſus eum habend' præcludat' &c. Et præd' Robertus ex quo ipſe ſufficientem materiam in lege ad ipſum Robertum actionem ſuam præd' verſus præfat' Willihelm', habend' manutenend' ſuperi' replicand' allegav', quam ipſe parat' eſt verific', quam quidem materiam prædict' Willihelm' non dedic' nec ad eam aliqualiter reſpond' ſed verification' illam admittere omnino recuſat, ut prius pet' judicium & debit' ſuum præd', una cum damnis ſuis occaſione detentionis debiti illius ſibi adjudicari &c. Et quia Juſtic' hic ſe adviſare volunt de & ſuper præmiſſis priuſquam Judicium inde reddant, dies datus eſt partibus præd' hic uſque in octab' ſancti Michaelis de audiend' inde Judicio ſuo, eo q'd iidem Juſtic' hic inde nondum &c.

Trin' 7 Jacobi Regis.

VINYOR's *Case.*

1 Brownl. 62.
2 Brownl. 290.

TRin' 7 *Jacobi*, *Rot.* 2629, *Robert Vinyor* brought an Action of Debt againſt *William Wyld*, on a Bond of 20 *l.* 15 *Julii*, *Anno* 6 *Regis nunc.* The Defendant demanded Oyer of the Bond and of the Condition thereon endorſed, which was, *That if the above bounden* William Wyld *do and ſhall from Time to Time, and at all Times hereafter, ſtand to, abide, obſerve, perform, fulfil and keep, the Rule, Order, Judgment, Arbitrament, Sentence and final Determination of* William Rugge, *Eſquire, Arbitrator indifferently named, elected and choſen, as well on the Part of the ſaid* William Wyld, *as on the Part of the ſaid* Robert Vinyor, *to rule, order, adjudge, arbitrate, and finally determine all Matters, Suits Controverſies, Debates, Griefs, and Contentions heretofore moved and ſtirred, and now depending between the ſaid Parties touching and concerning the Sum of Two and Twenty Pence heretofore taxed upon the ſaid* William Wyld *for divers Kind of Pariſh Buſineſs, within the Pariſh of* Themilthorpe *in the County of* Norfolk, *ſo as the ſaid Award be made and ſet down in Writing under the Hand and Seal of the ſaid* William Rugge, *at or before the Feaſt of Saint* Michael *the Archangel, next enſuing after the Date of theſe Preſents, That then*, &c. And the Defendant pleaded, That the ſaid *William Rugge nullum fecit arbitrium de & ſuper Præmiſſis*, &c. The Plaintiff replyed, That after the making of the ſaid Writing obligatory, and before the ſaid Feaſt of St. *Michael*, *ſcil.* 22 *Aug. Anno* 6 *ſupradicto apud* Themilthorpe *prædict' prædict'* Willihel' Wyld *per quodd' ſcript' ſuum cujus datus eſt eiſdem die & anno* (a) *revocavit & abrogavit*,

(a) March. Arbt. 107.

vit, Anglice, did call back, *omnem authoritatem quamcunque quam idem* Willielmus Wyld *per prad' scriptum obligatorium dedisset, & commisisset præfat'* Willielmo Rugge *arbitratori suo, & adtunc totaliter deadvocavit, & vacuum tenuit totum & quicquid dict'* Willielmus Rugge *post deliberationem ejusdem scripti sibi faceret in & circa dict' arbitr' regulam, &c. unde ex quo prad'* Willielmus Wyld *post confectionem prad' scripti, & ante prad' Festum Sancti* Michaelis *tunc prox' sequen' in forma prad' exoneravit, & abrogavit arbitratorem prad' de omni authoritate arbitrandi de & super Premissis in condit' prad' superius specific' contra formam & effectum conditionis illius, & submissionis in ead' mention' idem* Robertus *petit judicium*, &c. Upon which the Defendant demurr'd in Law. And in this Case three Points were resolv'd, 1. That altho' *William Wyld* the Defendant was bound in a Bond *to stand to, abide, observe*, &c: *the Rule*, &c. *Arbitrament*, &c. yet he might (*a*) counterm. it; for a Man cannot by his Act make such Authority, Power, or Warrant not countermandable, which is by the Law and of its own Nature countermandable; As if I make a (*b*) Letter of Attorney to make Livery, or to sue an Action in my Name; or if I assign Auditors to take an Account; or if I make one my Factor; or if I submit myself to an Arbitrament; altho' these are made by express Words irrevocable, or that I grant or am bound that all these shall stand irrevocably, yet they may be revok'd: So if I make my Testament and Last Will (*c*) irrevocable, yet I may revoke it, for my Act or my Words cannot alter the Judgment of the Law to make that irrevocable, which is of its own Nature revocable. And therefore (where it is said in 5 *Edw.* 4. 3. *b.* (*d*) if I am bound to stand to the Award which *I. S.* shall make, I could not discharge that Arbitrament, because I am bound to stand to his Award, but if it be without Obligation it is otherwise) it was resolv'd, That in both Cases the Authority of the Arbitrator may be revoked; but then in the one Case he shall forfeit his Bond, and in the other he shall lose nothing; for, *ex* (*e*) *nuda submissione non oritur actio*: and therewith agrees *Brooke* in abridging the said Book of 5 *Edw.* 4. 3. *b.* and so the Book of 5 *E.* 4. is well explain'd. *Vide* (*f*) 21 *H.* 6. 30. *a.* 29 (*g*) *H.* 6. 6. *b.* 49 *E.* 3. 9. *a.* 18 *E.* 4. 9. 8 *E.* 4. 10. 2. It was resolv'd, That the Plaintiff need not aver, that the said *William Rugge* had (*h*) Notice of the Countermand, for that is implied in these Words, *revocavit & abrogavit omnem auctoritatem*, &c. for without Notice it is no (*i*) Revocation or Abrogation of the Authority: And therefore if there was no Notice, then the Def. might take (*k*) Issue, *quod non*

(*a*) 2 Ventr. 119. 1 Brownl. 62. 2 Brownl. 290, 291. March Arbitrament 165. Br. Arbit. 49. Doct. Pla. 40.
(*b*) March Arbit. 165.
(*c*) Mar. Ar. 165. Bac. Max. Reg. 19.
(*d*) Mar. Arb. 164. 1 Roll. 331. Br. Arbit. 35.
(*e*) Mar. Arb. 164.
(*f*) Postea 82. b. Br. Arbit. 49.
(*g*) Fitz. Arb. 12. Br. Arbit. 4.
(*h*) 1 Brownl. 62. 2 Brownl. 290. 291. Mar. Arbit. 167.
(*i*) 1 Roll. 331.
(*k*) March Arb. 167, 168.

non revocavit, &c. and if there was no Notice, it should be found for the Defendant; as if a Man pleads, *quod* (a) *feoffavit, dedit*, or *demisit pro termino Vita*, it implies Livery, for without Livery it is no Feoffm. Gift or Demise; But there is a Difference when two Things are requisi. to the Performance of an Act, and both Things are to be done by one and the same Party, as in the Case of Feoffment, Gift, Demise, Revocation, Countermand, *&c.* And when two Things are requisite to be perform'd by several Persons; as of a Grant of a Reversion, Attornment is not implied in it, and yet without Attornment the Grant hath not Perfection, but forasmuch as the Grant is made by one, and the Attornm. is to be made by another, it is not implied in the Pleading of the Grant of one; but in the other Case both Things are to be done by one and the same Person, and that makes the Difference. And therew. agrees (b) 21 *H.* 6. 30. *a.* where *W. Bridges* brought an Action of Debt for 200 *l.* on an Arbitrament against *William Bentley*, the Def. pleaded, that before any Judgment or Award made by the Arbitrators, the said *William Bentley* discharged the said Arbitrators at *Coventry*, in the County of *Warwick*; and it was held a good Bar, and yet he did not aver any Notice to be given. So it is adjudged in (c) 28 *H.* 6. 6. *b.* 6 *H.* 7. 10, &c. 3. It was resolv'd, That by this (d) Countermand or Revocation of the Power of the Arbitrator, the Obligee shall take Benefit of the Bond, and that for two Reasons: 1. Because he has broken the Words of the Condition, which are, *That he should stand to, and abide*, &c. *the Rule, Order*, &c. and when he counterm. the Authority of the Arbitrator, *he doth not stand to and abide*, &c. which Words were put in such Conditions, to the Intent that there should be no Countermand, but that an End should be made, by the Arbitrator, of the Controversy, and that the Power of the Arbitrator should continue 'till he had made an Award; and when the Award is made, then there are Words to compell the Parties to perform it, *scil. observe, perform, fulfil, and keep the Rule, Order*, &c. and this Form was invented by prudent Antiquity; and it is good to follow in such Cases the ancient Forms and Precedents, which are full of Knowledge and Wisdom: and with this Resolution agrees the said Book of (e) 5 *Edw.* 4. 3. *b.* which is to be intended *ut supra*, That the Obligor cannot discharge the Arbitrament, but that he shall forfeit his Bond, and the Book gives the Reason, which is the Cause of this Resolution, *scilicet* (f) Because I am bound to stand to his Award, *scilicet, to stand to his Award*, which I do not when I discharge the Arbitrator. The other Reason is, because now the Obligor has by his own Act made the Condition of the Bond (which was endorsed for the Benefit of the Obligor, to save him from the Penalty of the Bond) impossible to

(a) Cro. El. 401. Cr. Jac. 411, 637. Cr. Car. 101, 170. Kelw. 7. a. Noy 118. Doct. Pla. 48 49, 239. Yelv. 135 Br. Pleadings 145 in Fine. 22 E. 3. 15. b. per Tremail. Plow. 149. b. Co. Lit. 303. b.

(b) Antea 82. a. Br. Arbitrem. 49.

(c) Antea 82. a. Fitz Arbit. 12. Br. Arbit. 4.

(d) 1 Brownl. 62. 2 Brownl. 290. March Arbit. 165 166.

(e) Antea 82. a. March Arbit. 164 1 Roll. 331. Br. Arbit. 35.

(f) March Arbit. 165, 166.

to be perform'd, and by Conſequence his Bond is become (*a*) ſingle, and without the Benefit or Help of any Condition, becauſe he has diſabled himſelf to perform the Condition. *Vide* (*b*) 21 *Edw.* 4. 55. *a. per Choke*, (*c*) 18 *E.* 4. 18. *b.* & 20. *a.* If one be bound in a Bond with Condition that the Obligor ſhall give Leave to the Obligee for the Space of ſeven Years to carry Wood, *&c.* in that Caſe altho' he gives him Leave, yet if he countermands it, or diſturbs the Obligee, the Bond is forfeited. And afterwards Judgment was given for the Plaintiff.

(*a*) 2 Brownl. 290.

(*b*) 5 Co. 21. a.
(*c*) 1 Brownl. 62. Br. Condit. 163.

Trin' 7 Jac. Rot. 3649.

Sir RICHARD PEXHALL's *Case.*

Co. Ent. 585. nu. 7. IN a *Second Deliverance* brought by *Euſtace Barton* againſt *Nicholas Moore*, for taking of his Cattle the 17 *April' anno* 5 *Jacobi Regis*, at *Broxhead* in the County of *Southampton*, in a Place called *Gate*. The Defendant avow'd the taking, becauſe Sir *Richard Pexhall*, Knt. was ſeiſed of the Manor of *Broxhead* in the ſaid County, whereof the Place in which, *&c.* was Parcel in Fee; and held it of the Biſhop of *Winchester* in Socage, as of his Manor of *Sutton*, and was alſo ſeiſed of the Manors of *Beanraper*, *Cranes*, *Chinham*, *Steventon*, and divers other Manors, Lands and Tenements, and of a Houſe in *London* deviſable by Cuſtom in Fee, and held the ſaid Manor of *Steventon* of the Queen by Knights Service *in capite*, and ſo ſeiſed, made his Will in Writing, and thereby deviſed to *Eleanor* his Wife, the ſaid Houſe in *London*, and two Parts of the other Manors, Lands and Tenements for 13 Years, and added a Proviſo, that the ſaid Deviſe ſhould not be prejudicial to any Eſtate, Title or Intereſt for Year or Years, Life or Lives, which ſhould be after deviſed in the ſame Will; and after in the ſame Will *dedit & legavit eidem Nicholao Moore Conſanguineo ſuo* 10 *l. exeun' & ſolubil' de & ex prad' Meſſuag' & de & ex prad' duabus partibus manerior' & cæterorum tenementorum prad'* quarterly, *ad maxime uſuales Feſta & pro non ſolutione inde, ad diſtring' & diſtrict' detinend' quouſq'*, &c. And that the ſaid Sir *Richard* ſo ſeiſed, dy'd ſeiſed *&c.* and for 20 *l.* for two Years ended *Anno* 16 *Eliz.* he a vowed and averred the Value of the ſaid Manors and Tenem aforeſ. at the Time of the Will, *&c.* to be 200 *l. per ann.* abov all Repriſ. and it app. by the Bar to the Avow. that the Word

of the Will were, *I will and bequeath to Dame* Eleanor *my Wife, all my Manors, Lands, Tenements,* &c. *for the Term of thirteen Years next after my Deceaſe: Provided, that this Gift, Deviſe and Bequeſt, made to the ſaid* Eleanor, *ſhall not be prejudicial to any of the Eſtate or Eſtates, Titles, or Intereſts, for Year or Years, Life or Lives, that ſhall be hereafter in this preſent Will given or bequeathed.* And further in the ſame Will deviſed, *Item, I give and bequeath to my Coſin* Nicholas Moore *a hundred Sheep, and ten Bullocks, and* 10 *l. iſſuing and payable out of my Lands and Tenements quarterly, at the moſt uſual Feaſts, and for Nonpayment to diſtrein, and the Diſtreſs to detain, until he be ſatisfied of the Arrearages, and to keep the Court and Courts of all my Manors upon lawful Requeſt to the ſaid* Nicholas, *by him or his Deputy, during his Life, and when the ſaid* Nicholas *ſhall think it moſt convenient and meet to keep.* And upon the whole Record, the Queſtions which aroſe out of this Part of the Will, were two: 1. If Sir *Richard Pexhall* had Power, by the Act of 34 *H.* 8. *c.* 5. to deviſe this Rent of 10 *l.* to *Nicholas Moore* out of all his Lands? 2. What Eſtate *Nicholas Moore* had in the Rent?

As to the firſt, it was objected, That Sir *Richard Pexhall* had not purſued the Power which the ſaid Act of 34 *H.* 8. gave him; for the Words of the Act are, *That every one,* &c. *may deviſe any Rent, Common, or other Profit out of the ſame two Parts, (viz. out of his Manors, Lands, Tenements and Hereditaments in three Parts to be divided) or out of any Part thereof, or as much thereof as ſhall amount to the full clear yearly Value of two Parts thereof:* And the ſole Queſtion depends upon the ſaid Clauſe of 34 *H.* 8. for the Statute of 32 *H.* 8. gives no Power to the Owner of the Land, to deviſe Rent, Common, or other Profit out of it: And in this Caſe, where Sir *Richard* had a Power to deviſe a Rent, *&c.* out of two Parts by that Act, he has deviſed a Rent out of all his Lands, and ſo has not purſued the Authority which the Act gave him, and the Clauſe of 34 *H.* 8. which follows next after the ſaid Branch of the Act, by which it is enacted, *That by the Authority aforeſaid, the ſaid Will ſo declared ſhall be good and effectual for two Parts of the ſaid Manors, Lands, Tenements or Hereditaments, although the Will declared be made of the whole, or of more than of two Parts,* extends only to a Deviſe of the Land itſelf, and not to any Rent, Common, or Profit out of it, as appears by the Letter thereof, and by all the ſubſequent Branches concerning the Diviſion; and this Clauſe is an Explanation of the Act of 32 *H.* 8. when all is deviſed, but, as hath been ſaid, the Power to deviſe a Rent, *&c.* out of the Land, is only given by the Statute of 34 *H.* 8. And the Opinion in *Butler* and *Baker*'s Caſe in the Third Part of my *Reports*, 33. *a.* was cited, where Co. Lit. 111. b.

(a) 3 Co. 13. a. Hob. 80. Co. Lit. 111. b.

it is said, that if a Man (*a*) seised of three Acres, (held by Knights Service) each of the yearly Value of 12 *d.* and he devises a Rent of 3 *s.* out of these three Acres, this Devise is void for the whole, because he doth not pursue the Power which the Statute prescribes; but in such Case, if he devises a Rent of 3 *s.* which is the Value of all, out of two Parts, it is good, because in that Case, the Value extends to the Land, and not to the Rent, for the Words are, *any Rent*, without any Restraint. As to that it was answer'd and resolv'd by the Court, 1. That it is true, that the Statute of 32 *H.* 8. doth not extend to a Devise of any Rent, *&c.* out of the Land, but the Power as to that, is given by the Statute of 32 *H.* 8. which has four distinct Branches as to this Point: 1. That every one having a sole Estate in Fee-simple, *&c. of and in any Manors*, &c. *and having no Manors*, &c. *holden of the K. or of any other Person by Knights Service, shall have full and free Liberty, Power, and Authority to give, dispose, will, or devise*, &c. *all his Manors*, &c. *or any Rent, Common, or other Profit, out of, or to be perceived of the same, or out of any Parcel thereof, at his own free Will and Pleasure, any Clause in the said former Act notwithstanding.* By this Branch it appears, That he who has no Lands held by Knights Service, may devise any Rent, Common, or Profit out of his Lands whereof he is seised in Fee, to what Value he will, altho' the Rent, Common, or Profit exceeds the Value of the Land; for the Words are, *at his own free Will and Pleasure.* The second Branch is, When any is sole seised of any Manors, *&c.* held of the K. *in cap' by Knights Service shall have full and free Liberty to devise*, &c. *by his Last Will in Writing*, &c. *two Parts of all his Manors*, &c. *or any Rent, Common, or Profit, out of, or to be perceived of the same two Parts, or out of any Parcel thereof in three Parts to be divided, or as much thereof as shall amount to the full and clear yearly Value of two Parts thereof, in three Parts to be divided at his own free Will and Pleasure.* The third Branch is, *That all and singular Person and Persons having a sole Estate in Fee simple*, &c. *of and in any Manors*, &c. *holden of the King by Knights Service, and not in Chief, or holden of any other Person by Knights Service, shall have full and free Liberty*, &c. *by his Last Will and Testament in Writing*, &c. *two Parts of the said Manors*, &c. *or any Rent, Common, or other Profit out of, or to be perceived of the same two Parts, or out of any Parcel thereof in three Parts to be divided, or as much thereof as shall amount to the full and clear yearly Value of two Parts thereof in three Parts to be divided, at his free Will and Pleasure.* The fourth Branch is, *And that the said Will so declared shall be good for two Parts of the said Manors*, &c. *altho' it be declared of the whole.*

And

And also for the whole of all other such Manors, &c. not holden by Knights Service, and of any Rent, Common, or other Profit, out of, or to be perceived of the same, or out of any Parcel thereof, at his free Will and Pleasure. By all which Branches it appears, that it is chiefly for the Benefit of the King or Lord (of whom the Land is held by Knights Service, *&c.*) that the Owner of the Land has Power by his Will to charge but two Parts, and by Consequence it tends to the Benefit of the Heir; for in Case when there is not any Tenure to draw Wardship, *&c.* there the Owner may at his free Will and Pleasure charge the whole. Then in the Case at Bar where the Manor of *Steventon* was held of the King in Chief by Knights Service, Sir *Richard* had (*) Power to charge but two Parts; yet when he charged the whole, he charged two Parts and more, and therefore it shall be good, for so much as the Statute enables him, and void for the Residue, *Quia (a) quan' plus fit quam fieri debet, videtur etiam ipsum fieri quod faciendum est*; but forasmuch as Sir *Richard* had Power by his Will to charge but two Parts, the Charge of the whole is void for the third Part, not only as to the King, or other Lord, but as to the Heir also, because, as to the third Part, the Will remains at the Common Law, which was utterly void; and according to this Judgment, and for the same Reason it was adjudged, *M.* 3 & 4 *Ph.* & *Mar. in Com' Banco, Rot.* 126. in (*b*) *Umpton* and *Hide*'s Case, That a Will in Writing after the Statute of 32 *H.* 8. and before the Statute of 34 *H.* 8. declared of the whole Land, whereof Part was held of the King by Knights Service *in Capite*, was good for two Parts: And so it had been if the Statute of 34 *H.* 8. had never been made, which is allone in Reason with the Case at Bar; and by this Construction the true Intention as well of the Testator in his Will, as of the said Acts of Parliament, without Prejudice to any, is well observed. And there is a Difference between the common Case of Licence, and the Case at Bar. For if the King (*c*) licences one to alien two Parts of his Manor of *D.* which is held of him *in Capite*, and he aliens the whole Manor, he has not pursued the Licence, for by his Alienation the whole Manor passes, which is not according to his Licence: But when an Act of Parliament authorizes the Owner of Land held *in Capite* to charge two Parts thereof, which he could not do by the Common Law, in this Case, if he charges his whole Land, it is meerly void for the third Part, and theref. he has well pursued the Author. which the Statute has given to him, to charge two Parts. So if a Man has the Moiety of the Man. of *D.* kno. by the Name of the Man. of *D.* and the K. licen. him to alie. the Moie. of the Man. and he alie. the Man. he has well pursu. the Licen. for in Truth noth. passed but the Moie. and so you will bett. unders. the Law, amon. the var. Opin. *Obiter* in *Plow. Com.* 68. *b.* and in *Butler* and *Baker*'s Case.

(*) Co. Lit. 111. b

(a) 5 Co. 115. a.

(b) 1 And. 3. 4. Plowd. 564. a. B. N. C. 486. 3 Co. 33. b. Br. Testam. 26. N. Bendl. 49. 50. pl. 88. Dy. 150. pl. 86 1 Leon. 76. 3 Leon. 29. Jenk. Cent 215

(c) Plowd. 68. b.

And as to the second Point, it was agreed *per totam Curiam*, that he had an Estate for Life in the said Rent of 10 *l. per annum.* 1. Because if it had been in a Grant, the Grantee should have it for Life: For if a Man by his Deed grants a Rent of 10 *l.* issuing and payable out of all his Lands quarterly at the usual Feasts, and for Nonpayment to distrein for the Rent, and all the Arrearages, in that Case the Grantee shall have the Rent (*a*) for Life: Also in Respect thereof he ought to hold the (*b*) Courts of all his Manors for his Life, *Et officium et feodum sunt concommitantia*, and he shall have the like Estate in the Fee, as he has in the Office. But it was objected, that then the Devisee should have also 100 Sheep and Bullocks yearly for his Life, as well as the Rent; *quod fuit negat' per tot' Cur'*, and that for two Causes: 1. the second (*c*) (*Et*) in the said Sentence disjoins and severs the Rent from the Sheep and Bullocks; as in the Case in 9 *E.* 4. 43. *b.* where two were bound to stand to the Arbitrament of *I. S. de* (*d*) *omnib' actionib' personalibus, sectis & Querelis*, this Word (*Personalibus*) shall be referred to all; But if the Words were, *de omnibus actionibus personalibus & sectis & querelis*, it shall be otherwise; for there the last (*Et*) disjoins *querelis* from the whole first Part of the Sentence, and shall be taken generally without any Reference to *personalibus*. So in the Case at Bar, when Sir *Ri.* devised 100 Sheep and 10 Bullocks, and 10 *l.* the last (*Et*) disjoins the Rent from the Sheep and 10 Bullocks: 2. These Words (*payable,* (*e*) *quarterly*) at the usual Feasts, ought to have Reference to the Rent, for 10 Bullocks *per annum* cannot be delivered quarterly. And Judgment was given for *Nicholas Moore* the Avowant.

(*a*) 7 Ass. pl. 1. 1 Roll. 845, 849. Plowd. 152. b. Cr. El. 330. Br. Estate 30. Perk. Sect. 104. Co. Lit. 42. a. 5 Bulstr. 194.

(*b*) 3 Bulstr. 194.

(*c*) Wing. Max. 12 Lit. Rep. 66, 67.

(*d*) Lit. Rep. 63. Fitz. Arbit. 16. March Arbit. 172

(*e*) Lit. Sect. 66, 67

Mich.

Mich. 7 Jacobi Regis.

BUCKMERE's *Case*.

IN a *Formedon* in *Remainder*, brought by *George Buckmere*, *Oliver Fowler*, *William Buckmere*, *Christopher Buckmere*, and *Nicholas Buckmere*, against *Robert Sayer*, and *Ursula* his Wife, of a House in the County of *Kent*, of the Nature of Gavelkind, the Case was such; *Thomas Bole* had Issue three Daughters, *Marion*, *Johan*, and *Catharine*, and gave the said House to *Marion*, and the Heirs of her Body begotten; the Remainder of one Moiety of the said House to *Johan*, and to the Heirs of her Body begotten, and the Remainder of the other Moiety to *Catharine*, and to the Heirs of her Body; and if the said *Johan* should die without Issue, the Remainder of her Moiety to *Catharine* and to the Heirs of her Body, with the like Remainder for want of Issue of *Catharine* to *Johan*: And afterwards *Marion* discontinued, and died without Issue, *& de eadem* Mariona *eo quod obiit sine hærede de corpore suo exeunte, remansit jus* (which proves she discontinued, for otherwise it should be *tenementa prad' remans.*) *unius medietatis tenementorum prad' cum pertin' per formam*, &c. *prad'* Johannæ Bole: *& remansit jus alterius medietatis eorundem tenementorum cum pertinentiis, per formam*, &c. *præfat'* Catharinæ Bole, and afterwards *Johan* died without Issue, by which the Right of her Moiety remain'd to the said *Catharine*, and after the Death of *Catharine*, *descendit jus integrorum tenementorum istis Georgio*, &c. and the Tenants demurr'd in Law on this Count, because the Demandants demanded by one Writ of *Formedon* sev. Remai. where the Demandants 2Brownl.274,275

dants ought to have demanded the ſeveral Remainders by ſeveral Writs. And becauſe we muſt ſhew in what Caſes the Demandant or Plaintiff ſhall join divers Cauſes of Action in one and the ſame Writ againſt the Tenant or Defendant, it muſt be obſerved, That there is a Difference between Actions real, and Actions perſonal, and between Actions real which are founded on a Title in the Writ, and Actions real meerly founded upon a Tort or Deforcement. Real Actions, which are founded upon Title are, as in a Writ of (a) Eſcheat. *Præcipe A. quod reddat B.* 10 *acras terræ*, &c. *quas C. de eo tenuit, & quæ ad ipſum B. reverti debent tanquam eſcacta ſua, eo quod prad' C. obiit ſine hæred'.* So the (b) *Ceſſavit*, *Præcipe A. quod reddat B. unum meſſuagium quod idem A. de eo ten' per certa ſervitia, & quod ad ipſum B. reverti debet*, &c. *eo quod idem A. in faciend' ſervitia per biennium jam ceſſavit.* So the Writ of Ward, and the Writ of Meſne, and the Writs of *Formedon* in Deſcender, Remainder, and Reverter. Then ſuppoſe, that *B.* before the Statute of (c) *Quia Emptores terrarum*, had by one Deed enfeoffed *A.* of *Black* Acre, to hold by Fealty and 3 *d.* and by another Deed had enfeoffed him of *White* acre, to hold of him by Fealty and 6 *d.* and afterwards *A.* had died without Heir, *B.* ſhould not have one Writ of (d) Eſcheat of theſe two Acres; for the Writ ſhall ſay, *Præcipe C. quod reddat B. duas acras, &c. quas A. de eo tenuit*, which ſhall be intended one intire Tenure; and therefore in ſuch Caſe the Demandant is driven to ſeveral Writs upon the two ſeveral Tenures; and therewith agrees 21 *H.* 7. 39. *b.* So, and for the ſame Reaſon, upon a Ceſſer in ſuch Caſe the Lord ought to have (e) ſeveral Writs of *Ceſſavit*: And therewith agrees 3 *Ed.* 3. 47. *a. b.* * 18 *Ed.* 3. *Ceſſavit* 20. (f) 10 *Ed.* 4. 1. *b.* & 2. *a.* (g) 10 *Hen.* 7. 24. *a.* So upon ſeveral Tenures the Tenant ſhall have ſeveral Writs of Meſne againſt the Meſne, and ſhall not join them in one Writ; and therewith agrees (h) 2 *H.* 5. 2. *b.* And one ſhall not have one Writ of Ward of the Body and Land upon ſeveral Tenures, as it is held in 6 *Edw.* 3. 48. *a. b.* 3 *Hen.* 6. 53. 17 *H.* 6. *Gard.* 117. But a Writ of Ward of Land was founded upon two ſeveral Tenures in 46 *E.* 3. *Tit. Brief* 619. but there it is held, that if he had demanded the Body, the Writ ſhould have abated. Then ſuppoſe *B.* by one Deed gives the Manor of *D.* to *A.* and to the Heirs of his Body, and afterwards *B.* by another Deed gives 50 Acres of Land to *A.* and to the Heirs of his Body, and afterwards *A.* dies without Iſſue, The Donor upon theſe two diſtinct Gifts ſhall not have one Writ of *Formedon* in Reverter, ſuppoſing *Quod idem B. dedit prædict' Manerium & quinquaginta acras terræ cum pertinentiis eidem A. & quæ ad præfat' B. reverti debent*, &c. no more than upon ſeveral Feoffments, *ut ſupra*, and Tenures reſerved, he ſhall have one Writ of (i) Eſcheat, or one Writ of (k) *Ceſſavit*; both which Writs

(a) F.N.B. 144. e. f. Reg. Orig. 164. b.

(b) F.N.B. 208. h. 2 Inſt. 401, 402.

(c) 2 Inſt. 500, 501, &c.

(d) Br. Eſcheat 13. Br. Joynder in Action 46.

(e) F.N.B. 209. b. Fitz Ceſſavit 40. * 18 E. 3. 48. b. Ceſſavit 20.

(f) Br. Ceſſavit 24. Fitz. Ceſſavit 3.

(g) Br. Ceſſavit 42.

(h) Fitz. Meſn. 6.

(i) 21 H. 7. 39. b. Br. Eſcheat 13. F. N. B. 209. b. Br. Joynder en-action 46.

(k) 3 E. 3. 47. a. b. 10 E. 4. 1. b. 2. a. 10 H. 7. 24. a. Br. Ceſſav. 24, 42. Fitz. Ceſſav. 3. 18 E. 3. 48. b. Ceſſavit 20.

Writs suppose, *quod tenementa prædicta reverti debent*. So of two several distinct Gifts to one with several Remainders over to one, he shall not have one Writ of Formedon in Remainder, nor the Issue of such Donee one Writ of Formedon in Descender, for the Foundation of these Writs is the Gift which is distinct and several; and therefore in such Cases, upon the several Foundations, there ought to be several Writs founded. But if Land be given to a Man, and to his Sister, and to the Heirs of their Bodies issuing, in that Case they are Joint-tenants for Life, and have (*a*) several Inheritances, *sc.* the Brother one Moiety to him and to the Heirs of his Body, and the Sister the other Moiety to her and to Heirs of her Body; in that Case, altho' the Inheritances were several, yet because the Foundation was one, and at one Time, and as out of one Root, for that Reason the Donor shall have one Writ of Formedon in the Reverter, and therein shall shew the Gift as it was to the Brother and Sister, &c. and conclude in the Close of the Writ, *Quia uterque eorum obiit sine hærede de corpore*, &c. which Words prove that each of them had a several Right; and so is the Book adjudged in *Roger Darderne*'s Case, in * 17 *E.* 3. 51. *a.* & 78. *a. b.* & 18 *E.* 3. 39. *a. b.* which is all one Case. So, if Lands be given to (*b*) Father and Son, and to the Heirs of their two Bodies begotten, the Remainder over in Fee, and afterwards the Father dies without any Issue but the Son, and afterwards the Son dies without Issue, and a Stranger abates, he in the Remainder shall have one Formedon in the Remainder, although the Estates Tail were several; yet forasmuch as well the several Estates in Tail, and the Remainder also depend upon one joint Estate in the Father and Son for their Lives, and all begin at one Time, for this Reason one Formedon in the Remainder lies. So in the said Case of (*c*) 17 *E.* 3. If Land had been given to Brother and Sister, and to the Heirs of their two Bodies begotten, the Remainder over in Fee, if the Brother dies without Issue, now the Sister has an Estate for Life in one Moiety, the Remainder over in Fee, and for the other Moiety an Estate Tail, the Remainder in Fee, and afterwards the Sister has Issue and dies, and a Stranger abates, now for one Moiety the Remainder begins, and after the Issue dies without Issue, altho' the Remainder falls at several Times, yet he in Remainder shall have one Formedon for both Remainders, which depend upon one and the same Estate, come to one and the same Person. And so is the Book to be intended in (*d*) 31 *Hen.* 6. 14. *b.* where it is said, a Man may have one Formedon of divers Gifts. *Vide* 44 *E.* 3. *Tit.* Tail 3. a good Case, and 50 *E.* 3. *Tit. Feoffments & Faits*, 97. & *H.* 4. 88.

(*a*) Co. Lit. 184. a. 18 E. 3. 39. a. b. 7 H. 4. 16. b. Br. Tail. 9. Br. Estate 11. Br. Deraignm. 13. 5 Co. 8. a. 1 Leon. 213.

* 1 Leon. 213.

(*b*) Dy. 145. pl. 64. 1 Leon. 213.

(*c*) 17 E. 3. 51. a. 78. a. b.

(*d*) Fitz. Brief 113. Ponea 8. b.

So

(a) 2 Brownl. 275.

So it was (*a*) resolved in the Case at Bar, That when the whole is devised to *Marion* in Tail, altho' the Devisor divides the Remainders by Moieties, yet, when the whole Land remains to *Catharine*, and all the Remainders depend upon one Estate, and begin by Devise at one Time, the Heirs of the Body of *Catharine* shall have one Formedon in the Remainder, in the same Manner as if the Remainder had been limited to *Catharine* and *Johan*, and to the Heirs of their two Bodies, the Remainder for Default of Issue of *Johan* to *Catharine*, and to her Heirs for ever.

But such Actions real, which are founded upon a Tort or Deforcement, and do not comprehend any Title in them, there the Demandant may demand in one Writ divers Lands and Tenements, which come to him by several Titles: As if divers Manors descend to me from several Ancestors, and I am disseised or deforced of them, I may have a Writ of Right, or a Writ of Entry in the Nature of an Assise, or a Writ of Assise, and comprehend all these Rights in one and the same Writ, because in these Cases no Title is made in the Writ. *Vide L.* 5 *Ed.* 4. 80. 12 *Ed.* 4. 1. *a.* 17 *Ed.* 3. 52. 17 *Ass.* 10. 12 *E.* 3. *Ass.* 112. 22 *Ass. p.* 52. 66. 7 *Ass. p.* 18. 7 *E.* 3. *Assise* 138. 15 *Edw.* 3. *Charge* 9. 15 *Ass. pl.* 11. But if I bring a Writ of Entry on a Disseisin done to my Mother and Aunt, Coparceners in Fee-simple, the Writ shall abate, for here Title is made in the Writ, and it appears that there were several Causes of Action, because the Title is by several Ancestors, and therewith agrees the Book in

(b) Antea 87. a. Fitz. Brief 113.

(*b*) 31 *H.* 6. 14. *b.* and 43 *E.* 3. 17. *a.* So if an Estate Tail descends to two Daughters Coparceners, and one enters into the whole, and the other has Issue, and she who enters dies without Issue, in that Case the Issue shall have several Writs of *Formedon* in the Descender of one Moiety of the Possession of his Mother, *quam insimul tenuit*, and of the other Moiety of the Possession of his Grandmother; and

(c) Fitz. Formed. 24. Br. Formed. 54. Br. Brief 504.

therewith agrees (*c*) 43 *E.* 3. 16, & 17.

And in personal Actions the Plaintiff may comprehend several Wrongs, and several Causes of Actions, as one Action of Trespass for several Trespasses committed at several Days, and in several Places. *Vide* (*d*) 31 *H.* 6. 14. *b.* (*e*) 8 *E.* 4. 5. *a.* & 44 *E.* 3. 34. 14 *H.* 8. 12. *b.* F. *N. B.* 60. An Action (*f*) of Wast upon several Leases, for in the Prohibition of Wast at the Common Law against Tenant in Dower, *&c.* Damages were only recovered which

(d) Fitz. Brief 113.
(e) Fitz. Trespass. 116.
(f) F.N.B. 60. f. Cro. Jac. 330. Popham 25.

was in the Perſonalty: So of Debt (*a*) upon ſeveral Leaſes.

Note, Reader, As to the bringing of Writs of *Formedon* theſe Differences; 1. If a Remainder be executed in a Writ of *Formedon* in the (*b*) Deſcender he ſhall never ſpeak of this Remainder, but the general Writ of *Formedon* in the Deſcender ſhall ſerve in that Caſe, and he ſhall count of an immediate Gift; for he cannot have a *Formedon* in the Remainder, when the Remainder is once executed. But if a Leaſe for Life be made, the Remainder in Tail to *A.* the Remainder in Tail to *B.* if *A.* dies without Iſſue in the Life of the Tenant for Life; if *B.* be driven to his *Formedon* in the Remainder, in his *Formedon* he ought to mention the Remainder to *A.* altho' it was determined and ſpent, as is aforeſaid. For the Demandant in the *Formedon* in the Remainder ought to make (*c*) mention of all the precedent Remainders in Tail, 8 *E.* 3. 19. *a. b.* 38 *E.* 3. 26. *a. b.* * 44 *E.* 3. 8. *a.* 50 *E.* 3. 1. *b.* 11 *H.* 4. 39. *a.* 18 *H.* 8. 4. *F. N. B.* 219. *Vide Regiſter* 239. *b.* & 243. *b.* & 244. *a. brevia nunquam faciunt mentionem de remanere quando breve eſt* in the Deſcender. 2. If a Man brings a *Formedon* in (*d*) Reverter or Remainder as Heir, the Omiſſion of the eldeſt Son who ſurvived the Father, or the like in the Pedigree, on the Part of the Donor, or of him in the Remainder, ſhall abate the Writ; but of the Part of the Donee, altho' the Donee had many Iſſues in lineal Deſcent inheritable to the Eſtate Tail, and who held the Eſtate, the Demandant need not name any of the Iſſues in the Clauſe & *quæ poſt mortem*; but ſhall ſay, & *quæ poſt mortem* of the Donee *ad ipſum reverti debet, eo quod* the Donee died without Iſſue; and that for two Reaſons: 1. Becauſe the Demandant is a Stranger to the Pedigree of the Donee. 2. Becauſe if the Iſſue ſhall be ſuppoſed by the Writ to die without Iſſue, yet it may be that the Eſtate Tail is not ſpent, for the Iſſue may have Brothers, or Couſins, inheritable to the Donee, and the Land ought not to revert to the Donor ſo long as the Eſtate Tail continues. And in ſome old written *Regiſters* the Clauſe is, *eo quod* the Iſſue died without Iſſue. But the printed *Regiſter*, which imitates the moſt antient and moſt true Precedents; & *quod poſt mortem* of the Donee *reverti debet, eo quod* the Donee died without Iſſue, and therewith agree 22 *Hen.* 6. 36. by the Juſtices, 4 *Eliz.* * *Dyer* 216. by the Juſtices, & 28 *Hen.* 8. *Dyer* 14, 16. *Vide* 18 *Ed.* 3. 42. 26 *Ed.* 3. 75. 25 *Edw.* 3. 44. 42 *Edw.* 3. 20. 44 *Edw.* 3. 40.

(*a*) 31 H. 6. 14. b. Yelv. 63. Fitz. Br. 113. 8 E. 4. 1. a. Mo. 914. Fitz. Treſp. 186. Cr. Jac. 68. Noy 3. 1 Brownl. 86, 87.

(*b*) 1 Mod. Rep. 219, 220. Palm. 224. F. N. B. 219. a. b. d. Reg. Orig. 244. a.

(*c*) Hob. 282. * Fitz. Formed. 26, 28. Br. Formed. 14.

(*d*) F.N.B. 220. d. 18 E. 2. Fitz. Formed. 59.

* Dy. 216. pl. 56.

10 *E.*

10 *E.* 3. 35 *E.* 3. *droit* 30, 47. 18 *E.* 2. *Formedon* 58, 59. *Regiſt.* 239. *a. b.* 3. In a *Formed.* in the (*a*) Deſcender, the Demandant (becauſe he is Privy, and ought to know his Pedigree and Deſcent) ought to make mention of every one to whom any Right did deſcend; as after a Diſcontinuance made by the Father, if the elder Son ſurvived his Father and died without Iſſue, yet the younger Brother ought to make mention of him in a *Formedon* in the Deſcender, otherwiſe if the elder Brother died without Iſſue in the Life of the Father: *a fortiori* he ought to make mention of every Heir in Tail who held the Eſtate; that is, who was ſeiſed by Force of the Tail. But obſerve alſo therein a Difference; for if any of the Heirs in Tail ſurvive their Father, and hold the Eſtate Tail, he ought to be named in the Writ Son and Heir; but if he ſurvives, and dies before he was ſeiſed, he need not name him Heir, but may name him Son only, *Et quod poſt mortem præd' D. & E. filii ejuſdem D. & E. filii & hæredis præd' D. &c.* So is the Writ when the elder Son doth not enter, and when the younger Son enters and is ſeiſed. *Vide Regiſter* 238. *b. F. N. B.* 212. *f.* 10 *E.* 3. 49, 50. 44 *E.* 3. 21, 40. 4 *E.* 2. *Formedon* 48. 11 *E.* 2. *ibid.* 56. 46 *E.* 3. 9. 6 *E.* 3. 261. 8 *E.* 3. 379. 11 *H.* 4. 72. *b.*

(*a*) Cr. El. 842. Cr. Car. 435. Cr. Jac. 412. Hob. 51, 52, 282. F. N. B. 220. d.

4. In a *Formedon* in the Deſcender the Demandant (*b*) ought always to make himſelf Son and Heir, or Couſin and Heir to him who was laſt ſeiſed by Force of the Tail, for a later Seiſin of any Heir in Tail after ſhall abate the Writ. 2. He who was laſt ſeiſed ought to be made Heir in Tail to the Donee, or otherwiſe the Writ is vicious, and it is not ſufficient that he be named Son, for he may be Son and not Heir. But the ſureſt Way for the Demandant is to make every one he names in the Writ to be Son and Heir in the Writ altho' they were never ſeiſed by Force of the Tail, and it is not material altho' he names them Heirs, whether they were ſeiſed or not, and thereby the Demandant will be certain to make himſelf Heir as well to the Donee *per formam doni*, as to him who was laſt ſeiſed. And therewith agree (*c*) 22 *H.* 6. 36. *a.* 8 *H.* 6. *Formed.* 4. 11 *H.* 6. 20. 8 *E.* 3. 11. 10 *E.* 3. 49. 27 *E.* 3. 81. 38 *E.* 3. 29. 48 *E.* 3. 7. 49 *E.* 3. 21. *Reg.* 238. *F. N. B.* 212. And, Note, in the *Form.* in Deſcend. there is the Clauſe, *Et quod poſt mort'*, &c. and then the Deſcent, and no Clauſe, *De eo quod*, &c. for that ſerves moſt convenient when the Eſtate Tail is ſpent, which ſerves well in a *Formedon* in the Reverter and Remainder, but not in Deſcender, unleſs in ſpecial Caſes. And ſo by theſe Differences, and the Rea-

(*b*) Hob. 51, 52. F. N. B. 212. b.

F. N. B. 212. f.

(*c*) Br. Form. 37.

ſon

ſon of them, you will better underſtand your Books. Note in the Caſe at Bar, altho' the Heirs of the Body of *Catharine* claim the Remainder by Deſcent, yet foraſmuch as *Catharine* was never ſeiſed in Poſſeſſion of the Eſtate Tail, but only of the Remainder; for this Cauſe the Writ ſhall ſay, *remanere debet*, and not, *deſcendere debet*; for the Writ ſhall never ſay, that the Thing ought to deſcend to one as Son and Heir, if the Anceſtor was not ſeiſed, by the Rule in the *Regiſter*, 241. *a.* & *b.*

N Mich.

Mich. 7 Jacobi Regis.

FRAUNCES's *Case.*

2 Brownl. 177.
3 Bulſtr. 327.
Cart. 172.
1 Rolls 430, 431.

IN a *Replevin* between *Richard Milner* Plaintiff, and *Tho. Fraunces* Defendant, which began *Mich.* 6 *Jacobi, Rot.* 2220. of his Cattle taken at *Bloxwich* in the County of *Staſford*, in a Place called *Newland*, the Defendant did avow the taking of the Cattel in the Place where, which contained ſix Acres, *&c.* becauſe it was his Freehold, and ſo did avow for Damage feaſant. The Plaintiff in Bar to the Avowry pleaded, That one *Richard Fraunces* was ſeiſed of the ſaid ſix Acres in Fee, and held them in Socage, and 7 *December* 45 *Eliz.* by his Will in Writing (whereof he made *Richard, Edward*, and *James* his Sons, his Executors) deviſed them to *John Fraunces* his eldeſt Son for the Term of ſixty Years, if the ſaid *John* ſhould ſo long live, the Remainder thereof to the ſaid *Thomas Fraunces* for his Life, the Remainder to the Heirs Males of the Body of the ſaid *John Fraunces*, the Remainder to the Heirs Males of the Body of the ſaid *Tho.* with divers Remainders in Tail to his other Sons, the Remainder to the right Heirs of the Deviſor: And afterw. 30 *Jan.* next follow. the Deviſor died, by which *John Fraunces* entred into the ſaid ſix Acres, and was thereof poſſeſſed, and 25 *Martii* 5 *Jac.* demiſed the ſaid ſix Acres to the Plaintiff for one Year next enſuing, wherefore he put in his ſaid Cattle, *&c.* (*a*) In Anſw. to the Bar of the Avowry the ſaid *Tho. Fraunces* ſaid

That

That the ſaid *Richard Fraunces* the Father was ſo ſeiſed, *&c.* and made his Will, as in the Bar to the Avowry is alledged. And further, That the ſaid *Richard Fraunces* the Father was ſeiſed in Fee of twenty Acres of Paſture in *Tibbington*, and of a Houſe and five Acres of Land in *Dorlaſton* in the ſaid County, and alſo of the ſaid ſix Acres, in which, *&c.* And the ſaid *Richard* the Father, after the making of the ſaid Will, 8 *Jan.* 45 *Eliz.* by his Deed of all the ſaid Lands, did enfeoff *Richard Fraunces* his Son, and *John Alport*, and their Heirs, to the Uſes and Intents following, *ſcil.* to the Uſe of *Richard Fraunces* the Father for his Life; and after his Death, of the Lands in *Tibbington*, to the Uſe of the ſaid *Thomas Fraunces* and his Heirs; and of the Lands in *Dorlaſton*, to the Uſe of the ſaid *James Fraunces*, his Heirs and Aſſigns; and of the ſaid Lands in *Bloxwich*, in which, *&c.* to the Uſe of the ſaid *John Fraunces* for ſixty Years after the Death of the ſaid Deviſor, if the ſaid *John* ſo long ſhould live; and after to the Uſe of the ſaid *Thomas* for Life, and after to the Heirs Males of the Body of the ſaid *John*; and afterwards to the Heirs Males of the Body of the ſaid *Thomas*, with divers other Remainders in Tail to his other Sons; the Remainder to the right Heirs of the Feoffor, with this Proviſo in the Deed: *Et ulteriu' per Script' præd' (a) proviſum fuit, quod ſi præd' Johan' Fraunces diſturbaret eund' Thomam Fraunces, vel præd' Jacobum Fraunces vel Hared' vel Aſſign' eorum vel alicuj' eorum &c. Sic quod non poterint quiete habere, tenere & gaudere talia Terras, Tenementa & Hereditamenta, qualia ipſe idem Richardus Fraunces pater conveiaſſet eis & cuilibet vel alicui eorum, vel aliquam partem & parcellum hujuſmodi terrarum tenementorum & hæreditamentorum, vel ſi præd' Johan' Fraunces, Executores, Adm'ores ſive Aſſign' ſui, &c. non permitter' Executores ipſi Rich' Fraunces vel eorum Aſſign' quiete habere, removere, capere & aſportare omnia & quælibet bona & catalla ipſi Rich' Fraunces Patris quæ eſſent & remanerent tunc in ſua domo manſionali &c. vel facerent aliquam rem ad impedendum vel deteriorandum Intentionem ipſi Richardi Fraunces Patris concernen' eadem in ejus ultima voluntate & Teſtamento expreſſa, quod tunc præd' uſus limitat' præfato Johanni Fraunces & hæredib' ſuis ceſſarent & penitus vacui eſſent ad omnes Intentiones:* And afterwards, 30 *Jan.* 45 *Eliz. Richard* the Father died, and the ſaid *John* entred into the ſaid ſix Acres, and was thereof poſſeſſed, the Remainder over as aforeſaid; and that the ſaid *Richard* the Father, at the Time of the ſaid Feoffment, did dwell in a Houſe in *Bloxwich* aforeſ. which is the Meſſuage mentioned in the ſaid Proviſo. And that the ſaid *Rich.* the Fath. was poſſeſſed of a Bedſtead, a Table-board, and a Cup-board, as of his proper Goods, and died thereof poſſeſſed in the ſaid Houſe:

(a) Co. Lit. 203. b. 2 Brownl. 277. Cart. 172. Cr. Car. 129. 1 Rolls 430, 431.

after whose Death the said *John* entred into the said House where the said Goods were, and took them, and was thereof possessed; and the said Executors 12 *Feb.* 45 *El.* came to the said House, and there then would have taken and carry'd away the said Goods, and requested the said *John*, *ad permittendum ipsos bona & catalla prædict' capere & asportare, prædict'* Johan' Fraunces *adtunc & ib' non permisit ipsos Execut' capere & asportare bona & catalla prædict' secund' formam & effectum prædict' scripti Feoffamenti, sed idem* Johan' *ne ipsi bona & catalla prædict' in eod' messuagio, ut præfertur existent' caperent vel asportarent penitus prohibuit & impedivit*; by which the said Term of 60 Years limited to the said *John* ceased; whereupon the said *Thomas*, as in his Remainder, enter'd, and was thereof seised for Life, *&c.* Upon which the Plaint. demurr'd in Law. And it was objected on the Plaint. Part, That the said Proviso was utterly void to cease the Use limited by the said Deed to the said *John*, for nothing by the same Deed is limited to him but for 60 Years, for inasmuch as he took but a Lease for Years, the Remaind. limited to his Heirs Males of his Body, after the Death of *Tho.* did not vest in him, but remained in contingency: Otherwise if *John* had taken an Estate for Life, and the Proviso made void the Use and Uses limited to the said *J. Fraunces* and his Heirs, where no such Use was limited to him; and theref. the Proviso void: And Provisoes and Condit. which go in Destruction and Defeazance of Estates are odious in Law, and shall be taken strictly, and shall not be construed to make void any other Use or Estate, which is not within the Words of the Proviso; for, (a) *Conditio beneficialis quæ stat' construit, benigne secund' verbor' intentio' est interpretanda, odiosa autem quæ statum destruit, stricte secund' verbor' proprietatem est accipienda:* As if a Feoffm. be made on such (b) Condit. that the Feoffee shall give the Land to the Feoffor, and to the Wife of the Feoffor, and to the Heirs of their two Bodies begotten, the Remaind. to the right Heirs of the Feoffor, if the Husb. dies, living the Wife, the Feoffee by the Law ought to make the Estate to the Wife, &c. as near the Condit. and also as near the Intent of the Condit. as he can make it (as *Littleton* holds, *lib. 3. cap. Condition, fol.* 82.) *scil.* to demise to the Wife for Term of her Life, without (c) Impeachment of Wast, and after her Decease to the right Heirs of her Husb. and her begotten, the Remainder to the right Heirs of her Husband: So *Littleton* saith there, If the Husband and Wife die before the Deed made, &c. And therewith agrees the Book in (d) 2 *H.* 4. 5. by all the Justices, although it was said, (e) 18 *Ass. pl. ult.* & 19 *E.* 3. *Entre congeable* 39. are contrary: But when Conditions enure in Destruction of Estates, then they shall be taken strict; as if a Man makes a Feoffment in Fee of certain Lands, upon Condition that

(a) Co. Lit. 218. a.

(b) Lit. 82. a. b. Co. Lit. 218. b. 219. a. b. Lit. Sect. 352.

(c) 11 Co. 82. b. 83. a. 2 Co. 23. a. 72. a. 82. a. 4 Co. 63. a. 1 Rolls Rep. 182. Moor 18, 327. 2 Inst. 146. Hob. 132. Poph. 193, 194, 195. Latch. 269, 270. Bridg. 102. Dyer 47. pl. 11. Plowd. 132. b. Cr. Jac. 216. Co. Lit. 219. b. 220. a.

(d) 1 Co. 137. b. Br. Condition 33. 2 H. 4. 5. b. Fitz. Condition 5. Condition 103. Postea 91. a.

(e) 18 Ass. 18. 2 Co. 80. a. 81. a. Br. Condition 11 Co. 83. b. 2 Co. 82. a. b. 1 Jones 181. Co. Lit. 222. a. b. 6 Co. 74. a. 1 Roll. 438.

that the Feoffee ſhall not give the Land to Huſband and Wife, and to the Heirs of their two Bodies begotten, if the Huſb. dies without Iſſue, and the Feoffee makes a Leaſe for Life to the Wife, without Impeachment of Waſt, *&c. ut ſupra*, it is no Breach of the Condition, for it is taken ſtrict, becauſe it extends to the Deſtruction of the Feoffment. So in the Caſe at Bar, foraſmuch as the ſaid Proviſo extends to the Deſtruction of a former Uſe and Eſtate, it ſhall be taken ſtrictly, and ſhall not deſtroy another Uſe by Conſtruction, than that only to which in Words it extends. To which it was anſwered and reſolved by the whole Court, That it is true, that Conditions or Proviſoes which will deſtroy former Eſtates, ſhall be taken (*a*) ſtrictly; but in this Caſe the Words of the Proviſo were ſufficient to ceaſe the Uſe limited to *John* for Years, and the Uſe limited to the Heirs Males of his Body; for the Words of the Proviſo are *quod tunc præd' uſus limitati præfato Johan' Fraunces & Hæredib' ſuis ceſſarent*, and therefore, if it be asked what Uſes ſhall ceaſe? The Proviſo will anſwer, *prædicti Uſus*: If it be further asked, To whom are *prædicti Uſus* limited? The Proviſo will anſwer, To the ſaid *John*, and to his Heirs. And if it be further asked, What Uſe expreſſed beſo. in the Indenture is limited to *John*? The Deed will anſwer, To *John* for 60 Years. And What Uſe beforementioned in the Indenture to his Heirs? The Deed will anſwer, A Remainder to the Heirs Males of his Body: So theſe Words (*prædicti Uſus*) by Reference to the Uſes before expreſſed in the ſame Deed, make the Words of the Proviſo to be ſufficient to ceaſe the Uſe before limited to the ſaid *John*, and the ſaid Uſe before limited to his Heirs to ceaſe: And it is all one to ſay *prædicti Uſus* before limited to his Heirs, and to ſay the Uſes before limited *prædictis Hæredibus*: In both which Caſes this Word (*prædicti*) has as ſtrong a Reference, as if the Uſes before limited had been particularly recited in the Proviſo; and *verba accipienda ſunt cum effectu*. But note Reader, the ſaid Books in (*b*) 18 *Aſſ. pl. ult.* & 19 *E. 3. Entr. Cong.* 39. are not contrary to *Littleton*, & (*c*) 2 *H.* 4. in the Caſe aforeſaid, but are ruled upon another reaſon, *& hæc ſunt diverſa, & non adverſa*, as it appears in the ſecond Part of my *Reports*, in the Lord *Cromwell*'s Caſe, *fol.* 80. *a.* where the ſaid Caſes are very well and at large explained; and therefore the outward ſemblance of Diſcord between our Books, in this and other Caſes, doth ariſe from the Ignorance of the inward underſtanding of the ſaid Caſes, and of the true Reaſon and Rule of them; for, for the moſt Part, every particular Caſe is adjudged upon a particular Reaſon. 2. It was reſolved, That denial by Parol is not (*d*) any Breach of the Condit. but there ought to be ſome Act done; as aſt. Requeſt made by the Execut. to (*e*) ſhut the Door aga. them, or to lay his Hands upon them, and to have reſiſted them, or ſuch like

(*a*) Co. Lit. 205. b. 218. a. 219. b.

(*b*) 18 Aſſ. 18. Antea 90. b. 2 Co. 80. a. 81. a. 6 Co. 74. a.

(*c*) Co. Lit. 222. a. b. Br. Condition 105. 1 Rolls 438. 2 H. 4. 5. b. 1 Co. 137. b. Br. Condition 33. Fitz. Condit. 5. 11 Co. 83. b. 2 Co. 81. a. b. 1 Jones 181. Antea 90. b.

(*d*) 9 Co. 51. a. 1 Rolls 430, 431. 1 Anderſon 137. 16 E. 4. 10. b. 11 a. 1 Jones 169. 2 Brownl. 277. Cr. El. 219. Cr. Jac. 679. Cr. El. 694. 1 Leon 230.

(*e*) 1 Rolls 430, 431. Cr. Jac. 679.

like Acts, so that by reason of some such Act, he would not suffer them to take or carry away the said Goods, according to the said Proviso. And *Coke* C. J. held, That in such Case it is not sufficient to say, *qd' pred' Johan' non (a) permisit pred' Extores, &c. quiete habere, remov' & cap' pred' bona*, or that *pred' Johan' imped' illos*, &c. but he ought to alledge a special Breach, by reason of some special Distur. or Interrup. in such Case by some Act, to which the other Party may have a certain Answer, and upon which a certain Issue may be taken, of which the Jury may inquire, and the Court may judge if it be a sufficient Breach of the Proviso, or not; and he cited the Book in 10 *E.* 3. 40. *Roger Fannell*'s Case, in an Assise brought by *John* against *Rog. Fannell* of 20 Acres of Land, and upon *nul tort* pleaded, the Assise found this special Matter, That *Rog. Fannell* leased by Deed to *John* the Plaint. a House and the 20 Acres of Land for 12 Years, and in Surety of his Term made him a Charter of Feoffm. (*b*) upon such Condit. That if the Lessee was disturbed within the Term, that he could not have the Tenem. 'till the End of the Term, that he should hold the Tenem. to him and his Heirs for ever: And furth. said, That *John* was disturbed of the Tenem. by which he was seised by the Manor, and prayed the Opinion of the Court, and this finding was insufficient for three Causes. 1. Because the Recognitors have found a Disturbance, and have not found by whom the Disturbance was made; for if the Disturbance was made by a Stranger, without the Assent or Procurement of the Lessor, the Lessor shall not lose his Inheritance. 2. They have not found how the Disturbance was made, but generally, that the Lessee was disturbed; so that the Court cannot judge that it was a Disturbance to make the Lessor lose his Inheritance. 3. Whether and how Livery and Seisin were made, *&c.* and theref. it appears in the Book, that *Shard* asked the Recognitors, 1. By whom he was disturbed? 2. How he was disturbed? 3. If Livery was made on both Charters? To the 1st they answered, By the Lessor. To the 2d, By the Sale, *&c.* by Feoffm. in Fee. To the 3d, On both. And thereupon *John* recover'd *quod nota*, a very good Case to this Purpose. And he cited also the Case in 35 *H. 6. Barr.* 162. (*c*) the Master of St. *Catharine*'s leased three Houses to one by Indenture, on Condit. that he should not permit or harbour any lewd Woman within the said Houses, if he be warned thereof by the Master, or his Servant, and if he did not turn her out within six Weeks after Warning by the Master or his Serv. that then the Master and his Successors should re-enter: And it was shewed, that the Lessee did suffer such a lewd Wom. to dwell there, wheref. such a Servant of the Master gave Warning to him, that he should turn her out; and he would not, but suffered the said Woman to continue there by the Space of six Weeks, wherefore the said Master ousted him, *&c.* To which the Lessee said,

(*a*) 2 Ventr. 139.

(*b*) Co. Lit. 217. a. Plowd. 34. a. 135. a. b. Fitz. Ass. 161. Br. Condit. 101. 10 Ass. 15. Plowd. 482. b. 10 E. 3. 39. b. 40. a.

(*c*) 2 Brownl. 277. Godb. 70. Moor 404. Owen 66. Co. Lit. 206. b. 1 Rol. 454.

said, That after the said Warning giv. the Master commanded the said lewd Woman to be in one of the said Houses, and continue there for six Weeks after; without that, that she continued there by the said Plaintiff: and it was held by the whole Court, that that Replicat. was not good, because the Indent. is, *Quod non permittat* any lewd Woman to continue there: As if I am (a) bound to you, to enfeoff you of one Acre of Land before such a Day, within which Time you disseise me, that is not to the Purpose, for you had no Colour to enter upon me, and I may re-enter and make the Feoffm. So in the same Case, the Master had no Colour to put the lewd Wom. into Possession; for which Cause the Lessee might well put her out. So it is no Plea, without (b) special Matter shewed: Wherefore the Lessee said, That the Master ousted him, and with Force, and against the Will of the Lessee, put her in Possession, and made her continue there with Force, against the Lessee's Will, for six Weeks, *&c.* and that was held a good Plea. And so it is in the Case of the Feoffm. before, such special pleading is good, *&c.* that he disseised him, and kept it with Force, so that he could not Enter: And these are the Words, Word for Word of the said Case: *a fortiori* in the Case at Bar, the said Prohibi. by Words, without an Act done by which the Executors cannot take the Goods, is no Breach of the Proviso. 3. It was resolved, That altho' the Defen. in the Case at Bar had particularly shewed a special Act of Disturb. against the Words of the Proviso, That yet the said *John* should not lose his Term; for none shall lose any Estate, or Intereſt which he lawfully has, without some Act or Default in himself; and theref. in this Case, forasmuch as *John* the eldest Son was a Stranger to this Feoffm. he shall not lose his Estate, without (c) Notice given him of the Proviso, and of the Will of his Fath. (d) *Qd' nostrum est sine facto sive defectu nostro amitti seu ad alium transferri non potest.* And the Opin. of (e) *Popham*, C. J. in (f) *Mallorie*'s Case, in the fifth Part of my *Reports*, f. 113. That the (g) Feoffee of Land, or (h) Bargainee of a Rever. by Deed indented and enrolled, shall not take advan. of a Condit. for non-payment of Rent reserved on a Lease, on a demand by them, without (i) Notice thereof given to the Lessee; nor shall the Lessor, by acceptance of Rent, dispence with a collateral Condit. broke by the Lessee, without Notice giv. to the Lessor, as it is adjudged in *Penant*'s Case, in the third Part of my *Reports*, 64. *a. b.* and the Judgm. *Hill.* 1 *Jac.* in Tresp. betw. *Beconshaw* Plain. and *Southcote* and others Defendants, in this Court, that if the Estate of the Lord of the Manor ceases by Limitation of an Use, and the Use and Estate thereof are transferred to another who demands the Rent of a Copyholder, who denies to pay it him, it is no Forfeiture, without Notice given the Copyholder of the Alteration of the Use and Estate: and

(a) Cr. El. 694. 374. Moor 404. Owen 65, 66. Co. Lit. 206. b. 1 Rolls 453.

(b) Cr. Jac. 679. Cr. El. 374.

(c) 1 Mod. Rep. 87 Palm. 164. 2 Bulst. 144, 277. 1 Jones 390. Cart. 93, 172. Winch. 116, 118 3 Keb. 19. Mar. Par. f. 246. 3 Mod. 28, 29.

(d) Cro. Argument. 19.

(e) Cr. Jac. 193.

(f) Cart. 93, 172. Cr. Jac. 617 Mod. Rep. 87. Palm. 207, 210. Godb. 162. Bridgman 130. 5 Co. 113. 2. b.

(g) Co. Lit. 215. b. Cr. Jac. 392. 5 Co. 113. 2. b.

(h) Co. Lit. 215. b. Cr. Jac. 392, 476. 2 Rolls Rep. 143. 5 Co. 113. b. Poph. 165. Latch. 25. Palm. 434. 3 Keb. 19.

(i) Mod. Rep. 88. Palm. 434. Moor 426, 456. Cr. El. 553, 572, 528. 2 And. 90, 91. Hard. 48. Doct. pl. 189.

(k) Co. Lit. 59 a.

another Judgment in this Court, That the Bargainee of a Manor by Deed indented and enrolled, ſhall not take Advantage of a Forfeiture of (a) a Copyholder for denial of Payment of Rent to him, without Notice given him of the Bargain and Sale, were all affirmed for good Law by the whole Court. And this agrees with the Reaſon of *Barrough*'s Caſe, *Mich.* 18 & 19 *El. Dy.* (b) 354. *a.* where Uſes were limited by Fine under this Proviſo, *That if B. at any Time during his Life, &c. do pay, or cauſe to be paid to the ſaid A.* 20 l. *at the Font-ſtone within the Cathedral Church of* Sarum, *that then, &c. the Conuſees in the ſaid Fine, and their Heirs, ſhould ſtand ſeiſed to the Uſe of B. and his Heirs.* And it was reſolved by *Wray*, *Dyer*, and *Manwood*, that Tender of the 20 *l.* at the Place, according to the Proviſo, in the Abſence of A. and no Notice of the Time of the Tender before given by B. to A. is not good in Law to make the firſt Uſes ceaſe, for the incertainty of Time during the Life of B. and therefore in ſuch Caſe Notice of the Time of the Tender ought to be given, altho' he to whom the Payment ſhould be made was Party to the Conveyance; But in ſuch Caſe, when B. will make a Tender, he ought to give Notice to A. that he will at ſuch Time make the Tender to him, and require him to be there to receive it; and then if he, at the Time appointed makes a Tender, altho' A. abſents himſelf, it is a good Performance of the Proviſo to make the Uſes ceaſe. But if a Man binds himſelf in a Bond to perform the Award of J. S. and J. S. makes an Award, the Obligor ought to take (c) Notice thereof at his Peril, for he has bound himſelf thereto; and in ſuch Caſe no Notice is requiſite to be given him, as it is held in (d) 1 *H.* 7. *f.* 5. *a. b.* A Man was bound in a Bond, on Condition that if he ſhould accompt before an Auditor by the Obligee to be aſſigned, when he ſhould be by him required, of certain Receipts of the Manor of D. and ſhould pay him the Arrearages that ſhould be found on his Accompt before the ſaid Auditor; that then the Obligat. ſhould be void: In Debt on that Bond, the Defen. pleaded, That the Plain. did aſſign him ſuch an Auditor, before whom he accompted, and that he has been always ready to pay the Arrearages found before the Auditor, if the ſaid Auditor had given him Notice; and it was held by the whole Court, in (e) 18 *E.* 4. 18. *a.* & 24. *a.* that the Plea was inſufficient, for inaſmuch as he has bound himſelf thereto, he has taken upon him to take Notice at his Peril; and there *Brian*, *Vavaſor*, and *Catesby* Juſtices agreed, That in the ſaid Caſe of Arbitrament, the Obligor ought to take Notice at his Peril, and ſo they ſaid it was adjudged in the ſame King's Time in the King's Bench; and ſo is the Law without Queſtion, againſt a ſudden Opinion in (f) 8 *E.* 4. 1. *a.* So *nota* a good Difference, when a Man binds himſelf to do or perform any Thing to be awarded, &c. by a Stranger,

(a) Co. Lit. 59. a

(b) 1 Bulſtr. 32. 1 Mod. Rep. 88. Cart. 93. Palm. 434. Dyer 354. pl. 32. Cr. El. 299. 13 Co. 2. 2 Keb. 816. 2 Bulſtr. 143. 1 Rolls 449. 3 Keb. 19. Cr. El. 298. Co. Lit. 211. a.

(c) Gr. Car. 133. 4 Co. 82. b. 2 Bulſtr. 144. Cr. El. 92. Owen 7. Cr. Jac. 391.

(d) Br. Condit. 124. 4 Co. 82. b. March. Arbitr. 191.

(e) Br. Det. 169. Br. Notice 13. Cr. Jac. 391. March. Aribtr. 191.

(f) Cr. Jac. 146. Br. Notice 12. 18. Fitz. Arbit. 15. Br. Arb. 15. Br. Arb. 37. March. Arb. 199. 4 Co. 82. b. Hutt. 81.

ger, he thereby takes upon himſelf to take Notice at his Peril of all Things incident thereunto for the ſaving of his own Bond; but, as appears in the Principal Caſe, and in the other Caſe beforeſaid, the Law will not compel one to take (*a*) Notice of Acts done between Strangers, or of any Incertainty on Pain of Forfeiture of his Eſtate, or Intereſt; but in ſuch Caſe Notice ought to be given them who are to have the Loſs. 4. It was reſolved, That altho' now it (*b*) appears, that the Title by which the Plaintiff claims in his Bar to the Avowry was utterly deſtroyed, (for the Plain. claims by the Will of *Rich. Fraunces* the Father, which Will appears was afterw. countermanded by the ſaid Feoffm. which the Avowant after pleads, and which the Plaintiff confeſſes by his Demurrer) yet the Plaintiff ſhall have Judgment, becauſe his Count is good, and the Avowant in his Replication to the Bar of his Avowry has done two Things; One, he has deſtroyed the Title which the Plaintiff made by the Will; the other, he has given the Plaintiff another Title, *ſcil.* to have the Land for 60 Years, *&c.* by Force of the Uſes declared on the Feoffment. So that upon the (*c*) whole Record it appears (upon which the Court ought to judge) that the Plaintiff has a lawful Term in the Land; and that the Defendant has taken his Cattle wrongfully, and therefore Judgment ought to be given againſt the Avowant, and for the Plaintiff, altho' the Title which he made for himſelf was deſtroyed. And Judgment was entred accordingly.

(*a*) Cr. Jac. 146. Cr. Car. 577. Winch. 118. 1 Mod. Rep. 87.

(*b*) Wing. Max. 238. 7 Co. 25. a. Poſtea 120. b. 3 Co. 52. b. 11 Co. 85. b. Hob. 14.

(*c*) Winch. 75.

Hill.

Hill. 7 Jacobi Regis.

EDWARD FOX's *Case.*

2 Brownl. 291. Hard. 49. Lit. Rep. 279.

IN a Writ of *Second Deliverance* by *Eliz. Smalman* Widow, and *Tho. Powys* Defendant, which began in *Communi Banco*, 7 *Jac. Rott.* 1546. the Defendant demurr'd on the Bar to the Avowry; and on the Record the Case was such, *Edward Fox* seised of 4 Acres of Meadow, 50 Acres of Pasture, and 10 Acres of Underwood, in *Snitton* in the County of *Salop*, *Anno* 31 *Eliz.* demised them to *Gilb. Smalman*, and to the said *Elizabeth* his then Wife, and to *Thomas Smalman*, *Habendum* to *Gilbert* and *Elizabeth* for their Lives, the Remainder to the said *Thomas* for his Life, yielding during their Lives, the yearly Rent of four Marks, at the Feasts of the Annunciation of our Lady, and St. *Michael* the Archangel, by equal Portions; and afterwards the said *Gilbert Smalman* died; after whose Death, *Scilicet* 20 *Sept. Anno* 3 *Regis Jacobi*, the said *Edward Fox* by Indenture, for the Consideration of 50 *l. præd'* by the said *Tho. Powys* to the said *Edward Fox* paid, * demised, † granted, set, and to farm let to the said *Tho. Powys* the said Tenements aforesaid; To have and to hold to the said *Tho. Powys* from the Day of the Date of the said Indenture, for the Term of 99 Years, yielding and paying therefore during the said Term, to the said *Edw. Fox* and his Heirs, the yearly Rent of 40 *s.* at the Feasts of the Annunciation of our Lady, and St. *Michael* the Archangel, or within 28 Days after every of the said Feasts, and that the said *Eliz.* did never Attorn. And the only Point in this Case was, Whether the said Demise and Grant to *Tho. Powys* should amount to a Barg. and Sale, so that the Revers. with the Rent should pass to *T. Powys* by the Stat. of Uses without any (*a*) Attornm. And it was adjudg. that this

* 1 Mod. Rep. 87.
† 1 Roll Rep. 23.

(*a*) Cr. El. 166.

this Demiſe and Grant upon Conſideration of 50 *l.* amounts to a (*a*) Barg. and Sale for the ſaid Years; for in Caſe when a Freeh. or Inherit. ſhall paſs by Deed indented and inrolled, it need not have the preciſe Words of Bargain and Sale, but Words (*b*) equipollent, or which do *tantamount*, are ſufficient; as if a Man (*c*) covenants in Conſideration of Money to ſtand ſeiſed to the Uſe of his Son in Fee; if the Deed be enrolled, it is a good Bargain and Sale, and yet there are not any Words of Bargain and Sale, but they amount to ſo much, as it is held in *Bedel's* Caſe, in the Seventh Part of my *Reports*, 40. *b.* So if a Man for Money (*d*) aliens and grants Land to one and his Heirs, or in Tail, or for Life, by Deed indented and enrolled, it amounts to a Bargain and Sale, and the Land ſhall paſs without any Livery and Seiſin. And at the Common Law before the Statute of (*e*) 27 *H.* 8. of Uſes, If a Man for Money had aliened and granted Lands to one and his Heirs, *&c.* by that the Uſe of the Lands ſhould paſs, for it is a full Bargain, and all this was unanimouſly agreed; but foraſmuch as the (*f*) Intention of the Parties is the Creation of Uſes, (*g*) if by any Clauſe in the Deed it appears, that the Intent of the Parties was to paſs it in Poſſeſſion by the Common Law, there no Uſe ſhall be raiſed; and therefore if any Letter of (*h*) Attorney be in the Deed or Covenant to make Livery of the Lands, according to the Form and Effect of the Deed, or other ſuch like, there it ſhall not paſs by Way of Uſe; *quia verba intentioni non e contra debent inſervire: & verba debent intelligi, ut aliquid operentur.* But in the Caſe at Bar, the Intent of the Grantor may be well collected, that he did intend that the Grant ſhould take effect preſently, and ſhould not depend upon any ſubſequent Attornment; for the Rent reſerved thereupon was payable preſently; and therefore it will be reaſonable, that *Tho. Powys* the Leſſee ſhould have the Rent reſerved on the firſt Leaſe for Lives preſently; and that he cannot have before Attornment (which peradventure will never be made) and *eo potius* becauſe the ſaid *Tho. Powys* has no Means to compel the firſt Leſſees to attorn; But if it ſhall paſs as a Bargain and Sale, it ſhall be preſently executed by the Statute of 27 *Hen.* 8. for there needs no (*i*) Inrollment in this Caſe, becauſe but a Term for Years paſſes, and no Eſtate of Freehold, and there needs no (*k*) Attornment, becauſe it is executed by the Statute. And by this Conſtruction every one will have Remedy for that which he ought to have. *Vide* Sir Rowland (*l*) Heywood's *Caſe, in the Second Part of my Reports, fol.* 35. *b.*

(*a*) 1 Mod. Rep. 177. 1 Vent. 138. 2 Ventr. 318. 1 Roll. Rep. 73. 2 Brownl. 291, 292. 2 Inſt. 272. 1 Jones 206. 1 Siderf. 26.
(*b*) 2 Inſt. 672. 2 Ventr. 318.
(*c*) 2 Brownl. 291, 292. 2 Inſt. 672. 1 Ventr. 138. 2 Ventr. 318. 7 Co. 39. b. 11 Co. 24. b. 25. a. Cro. El. 394. Cart. 138, 146. Palm. 214, 215. Jenk. Cent. 289.
(*d*) 2 Inſt. 272.
(*e*) 27 H. 8. cap. 10.
(*f*) Co. Lit. 49. a. 2 Inſt. 272. 1 Co. 100. a.
(*g*) 2 Inſt. 272.
(*h*) 2 Brownl. 291. 2 Inſt. 272. 2 Roll. 787. Co. Lit. 49. a.
(*i*) 2 Co. 36. a. 2 Roll. Rep. 204. 2 Inſt. 671.
(*k*) 2 Brownl. 292. 2 Co. 36. a. 6 Co. 68. b. 69. a. 2 Brownl. 291, 292.
(*l*) 1 Brown. 142. 2 Brownl. 292. 1 Jones 206. 2 Roll. 787.

Hob. 159. Poph. 95. 2 Anderſ. 202, 203. 2 Inſt. 671, 672. Yelv. 123, 124. 1 Mod. Rep. 176.

Hill.

Trin. 7 Jacobi Regis.

MATTHEW MANNING's *Case.*

Co. Ent. 149. b. Num. 29. Swinb. 234, 235.

IN Debt for 200 Marks by *William Clark* Plaintiff, and *Matthew Manning* Adminiſtrator of *Edward Manning* deceaſed, upon *plene adminiſtravit* pleaded, the Jury gave a ſpecial Verdict to the Effect following, which Plea began *Mich.* 4 *Jacobi, Rott.* 1829. *Edward Manning* the Inteſtate *Anno* 30 *Eliz.* was poſſeſſed of the Moiety of a Mill in *Clifton*, in the County of *Oxford*, for the Term of 50 Years, of the clear yearly Value of 40 *l.* and afterwards the ſaid *Ed. Manning*, 30 *Eliz.* made his Will in Writing, and thereby deviſed his Indenture and Leaſe of the Farm and Mill in *Clifton*, and all the Years therein to come to *Matthew Manning* after the Death of *Mary Manning* my Wife, (which Farm and Mill my Will is, that *Mary Manning* my Wife ſhall enjoy during her Life,) conditionally, that the ſaid *Matthew* ſhall not demiſe, ſell, or give the ſaid Leaſe, but to leave it wholly to *John* his Son, *&c. In the mean time my Will and Meaning is, That* Mary Manning *my Wife ſhall have the Uſe and Occupation both of the Farm and Mill,* &c. *during her natural Life: Yielding and paying therefore yearly to the ſaid* Mat. Manning, &c. *during her natural Life ſeven Pounds at the Feaſts of St.* Michael *the Archangel, and the Annunciation of our Lady*, and made *Mary* his Wife his ſole Executrix, and died; *Mary* took upon her the Charge of the Will, and had not ſufficient to pay the Debts of the ſaid *Ed. Manning* above the ſaid Term; but ſhe entred into the ſaid Farm and Mill, and paid to *Mat. Manning* the yearly Sum of 7 *l.* accord. to the ſaid Will; and (*a*) ſaid, That if ſhe died, the ſaid *Mat. Manning* ſhould have the Farm and Mill aforeſaid; and afterwards the ſaid *Mary*, 16 Years after the Death of her Husband died inteſtate, after whoſe Death the ſaid *Mat. Manning* entred into the ſaid Farm and

(*a*) 2 Brownl. 273.

and Mill, and was thereof poſſeſſed *prout Lex poſtulat*; and afterw. Adminiſtration of the Goods of the ſaid *Edw.* by the ſaid *Mary* not adminiſtred was committed to the ſaid *Matth.* and that none of the Profits of the ſaid Farm and Mill, which accrued in the Life of the ſaid *Mar.* came to the Hands of the ſaid *Mat.* beſides the ſaid 7 *l.* yearly as aforeſ. And the Doubt of the Jury was, If the Reſid. of the ſaid Term in the ſaid Farm and Mill ſhould be Aſſets in the Hands of the ſaid *Mat.* But I conceived on the Trial of the Iſſue at *Guild-hall* in *London*, That the Deviſe to *Matt.* was good, and that there was ſufficient * Aſſent to the Legacy, by the ſaid Paym. of the Rent of 7 *l.* But yet upon the Motion of the Plaintiff's Counſel, I was contented, that the whole ſpecial Matt. ſhould be found as is aforeſ. And the Caſe was argued at the Bar, and at divers ſever. Days debated at the Bench, and *prima facie Walmſley* Juſt. conceived, That the Deviſe to *Matt. Manning* after the Death of the Wife was void, for the Wife having it deviſed to her during her Life, ſhe had the whole Term, and the Deviſor could not deviſe the (*a*) Poſſibility over, no more than a Man can do by Grant in his Life; for that which the Teſtator cannot do by no Advice of Counſel in his Life, (*b*) the Teſtator, who is intended to be *inops conſilii*, ſhall not do by his Will; but by Grant in his Life he could not grant the Land unto the Wife for her Life, the Remaind. over to another, for by the Grant the Wife had the whole Term at leaſt if ſhe ſo long lived, and a Poſſibility cannot be limited by Way of Remainder; and altho' the later Opinions in the Caſe (where a Man poſſeſſed of a Leaſe for Years, deviſes it to one for Life, the Remaind. to anoth.) have been, that the Remaind. was good; yet he ſaid that the old Opinion, which hath more Reaſon, as he conceived, was, that the Remainder in ſuch Caſe was void, 28 *H.* 7. (*c*) 7 *Dyer*, *Baldwyn* and *Shelley*, that the Remainder is void, *Engleſield* contrary. (*d*) 6 *E.* 6. 74. *acc.* by *Hales* and *Mountague*: 2 *E.* 6. *Tit. Deviſe*, *Brook* 13. that the Remaind. is void, for the Deviſe of a Chatt. for one Hour is good for ever. But *Coke* Ch. Juſt. *Warburton*, *Daniel*, and *Foſter* contrary, that the Deviſe was good to *Mat. Manning*; and five Points were by them reſolved. 1. That *Matt. Manning* took it not by Way of Remainder, but by Way of an (*e*) executory Deviſe, and one may (*f*) deviſe an Eſtate by his laſt Will in ſuch Manner, as he can't do by any Grant or Conveyance in his Life, as if a Man is ſeiſed of Lands in Fee held in Socage and deviſes, that if *A.* pays ſuch a Sum to his Executors, that he ſhall have the Land to him and his Heirs, or in Tail, or for Life, *&c.* and dies, and afterw. *A.* pays the Mon. he ſhall have the Land by this executory Deviſe, and yet he could not have it by any Grant, or Conveyance executory at the Comm. Law; but it ſtands well with the Nature of a Deviſe; So in the Caſe at

* 1 Lev. 25.

(*a*) Cro. El. 9. 217. Cro. Jac. 198.

(*b*) 1 Co. 85. b.

(*c*) Dy. 7. pl. 8. 1 Bulſtr. 191, 192. Mo. 738. Poſtea 97. 2. Wentw. 334. Palm. 334.

(*d*) Dy. 74. pl. 18. 1 Bulſtr. 195.

(*e*) 2 Bulſtr. 28. 1 Jones 15. 1 Mod. Rep. 51, 115. Moor 635, 748, 758. 4 Co. 66. b. 2 Rol. Rep. 218, 220, 427. Cr. Eliz. 796. Cr. Jac. 198, 460, 461. Cr. Car. 230. B. N. C. 209. 10 Co. 47. 2. b. Swinb. 134, 135. 2 Brownl. 173. 33 H. 8. Br. Chat. 23. 4 Bulſtr. 191, 192, &c. 1 And. 122. c. 170.

(*f*) Swinb. 135. 2 Brownl. 309.

at Bar when the Wife dies it ſhall veſt in *Matt. Manning* as by an executory Deviſe, as if he had deviſed that after his Son has paid ſuch a Sum to his Executors, that he ſhall have his Term; or that after the Death of *A.* that *B.* ſhall have the Term; Or that after his Son ſhall return from beyond the Seas, or that *A.* dies, that he ſhall have it, in all theſe Caſes and other like, upon the Condition or Contingent performed, the Deviſe is good, and in the mean Time the Teſtator may diſpoſe of it, and therefore in Judgment of Law, (*a*) *ut res magis valeat*, the executory Deviſe ſhall precede, and the Diſpoſition of the Leaſe, 'till the Conting. happen, ſhall be ſubſequent, as in the Caſe at Bar it was, and ſo all ſhall well ſtand together; For when he made the executory Deviſe he had lawful Power, and might well make it; and afterwards in the ſame Will he had lawful Power, and might well deviſe the Leaſe 'till the Contingent happen'd, and therefore it is as much, (*b*) as if the Teſtator had deviſed, that if his Wife died within the Term, that then *Mat. Manning* ſhould have the Reſidue of the Term; and farther deviſed it to his Wife for her Life. 2. The Caſe is more ſtrong, becauſe this Deviſe is but of a Chattel, whereof no *Precipe* lies; and which may (*c*) veſt, and reveſt at the Pleaſure of the Deviſor, without any Prejudice to any. And therefore if a Man makes a Leaſe for Years, on Condition, that if he do not ſuch a Thing, the Leaſe ſhall be void, and afterwards he grants the Reverſion over, the Condition is broken, the Grantee ſhall take (*d*) Benefit of this Condition by the Common Law, for the Leaſe is thereby abſolutely void; but in ſuch Caſe, if the Leaſe had been for (*e*) Life, with ſuch Condition, the Grantee ſhould not take Benefit of the Breach of the Condition; for a Free-hold (of which a *Præcipe* lies) cannot ſo eaſily ceaſe; but is voidable by Entry, after the Condition broken, which can't by the Common Law be transferred to a Stranger; and therewith agrees (*f*) 11 *H.* 7. 17. *a.* & *Br. Conditions* 245. 2 *Mariæ*, by *Bromly* the ſame Difference. 3. There is no Difference when one deviſes his Term for Life, the Remainder over; and when a Man deviſes the Land, or his Leaſe, or Farm, or the Uſe (*g*) or Occupation, or Profits of his Land; for in a Will the Intent and Meaning of the Deviſor is to be obſerved, and the Law will make Conſtruction of the Words to ſatisfy his Intent, and to put them into ſuch Order and Courſe, that his Will ſhall take Effect. And always the (*h*) Intent of the Deviſor expreſſed in his Will, is the beſt Expoſitor, Director, and Diſpoſer of his Words: And when a Man deviſes his Leaſe to one for Life, it is as much as to ſay, he ſhall have ſo many of the Years as he ſhall live, and that if he dies within the Term, that another ſhall have it for the Reſidue of the Years; and altho' at the Beginning it be uncertain how many Years he ſhall live, yet when he dies it is

(*a*) 1 Co. 76. a. 3 Keb. 288. 2 Jo. 69. 5 Co. 55. b. 1 Mod. Rep. 109.

(*b*) Swinb. 135.

(*c*) Swinb. 135.

(*d*) 3 Co. 64. b. 65. a. 10 Co. 48. b. Co. Lit. 214. b. 219. a. Plowd. 135. b. 136. a. Cr. El. 649, 650. 2 Roll. 473, 474. 1 Leon. 61.

(*e*) 10 Co. 48. b. Co. Lit. 214. Plowd. 135. b.

(*f*) 3 Co. 65. a.

(*g*) 1 Bulſtr. 192. 2 Bulſtr. 28. March 106. Poſtea 96. b. Godb. 26. Swin. 135. Jenk. Cent. 264. 10 Co. 47. a. b. Plow. 524. Cro. El. 190. Co. Lit. 4. b.

(*h*) Plow. 522, b. 523. a. Bridgm. 135. Co. Lit. 112. b. Cro. Car. 9.

is certain how many Years he has lived, and how many Years the other shall have it, and so by a subsequent Act all is made certain. 4. That, after the Executor has assented to the first Devise, it lies not in the Power of the first Devisee to (*a*) bar him who has the future Devise, for he can't transfer more to another than he has himself. 5. In many Cases a Man by his Will may create an Interest, which by Grant or Conveyance at the Common Law he cannot create in his Life; And therefore when Sir *Will.* (*b*) *Cordell* Master of the Rolls devised his Manor of *Melford*, *&c.* in the County of *Suffolk*, to his Executors for the Paym. of his Debts, and until his Debts should be paid, the Remainder to *Edward* his Brother, *&c.* and made *George Carey* and others his Executors, and died, and after his Death the Debts were paid; and his Wife demanded Dower, and one Question amongst others was moved, What Interest or Estate the Executors had? for if they had a Freehold, then the Wife should not have Dower, and if they had but a Chattel determinable upon the Payment of the Debts, then she should be endowed; and this Case was referred to *Anderson* Ch. Just. of the Common Pleas, and *Francis Gawdie* Just. of the King's Bench, before whom the Case was at several Days debated *Pasch.* 36 *Eliz.* and I was of Counsel with the Executors; And it was Resolved by them, that the (*c*) Executors had but a Chattel, and no Freehold, for if they should have a Freehold for their Lives, then their Estate would determine by their Death, and not go to the Executors of the Executors, and so the Debts would remain unpaid; but the Law adjudges it a particular Interest in the Land, which shall go to the Executors of the Executors, as Assets for Payment of his Debts. But if such Estate be made by Grant, or Conveyance at the Common Law, the Law will adjudge it an Estate of Freehold, and so a more favourable Interpretation is made of a Will in Point of Interest or Estate to satisfy the Will of the dead for the Payment of his Debts, than of a Grant or Conveyance in his Life; which he may enlarge, or make other Provision at his Pleasure. And so was it resolved in the Beginning of the Reign of Q. *Elizabeth*, that where a Man had Issue a Daughter, and devised his Lands to his Executors for the Payment of his Debts, and until his Debts were paid, and made his Executors and died, the Executors entred, the Daughter married, and had Issue and died, and after the Debts were paid, it was Resolved in the Case of one *Guavarra*, that he should be Tenant by the Courtesy, *Vide* 13 *H.* 7. 13. 27 *H.* 8. 5. 21 *Ass. p.* 8. 14 *H.* 8. 13.

Note Reader, it has been of late oftent. adjudg'd accord. to these Resolutions, *&c.* in *Weldon's* (*d*) Case, *Plow. Com' in Communi Banco.* In *Paramour's* (*e*) Case, *Plow. Com.* in the K's Bench, *Mich.* 26 & 27 *Eliz.* in a Writ of (*f*) Error in the K's Bench, on a Judgm. given in the Com. Pleas, the Case was such, *Tho.*

(*a*) 10 Co. 47. 2. b. Dy. 74. pl. 18. 140. pl. 41. Cr. Jac. 460, 461. Moor 748. 2 Brownl. 173. Cro. Car. 293. 1 Bulstr. 194. 3 Bulstr. 123. 1 Roll. 620.

(*b*) Co. Lit. 42. a. Cro. El. 315, 316. 1 Jones 25. 1 Roll. 829, 830. Raym. 136, 137. 1 Sid. 224. 2 Bulstr. 273. Aleyn 47.

(*c*) 1 Roll. 830. Co. Lit. 42. a. Aleyn 47. Cr. El. 315, 316.

(*d*) 2 Brownl. 309. Plowd. 516, 519. 2 Leon. 92. 3 Leon. 89.

(*e*) 2 Brownl. 309. Plowd. 539, 540. 2 Leon. 92. 3 Leon. 89.

(*f*) 2 Leon. 92. 3 Leon. 89. Godb. 26. 1 And. 60. 1 Roll. 612.

(*a*) *Amner*

(a) Jenk. Cent. 264. Moor 758. 2 Bulſtr. 192. 1 Roll. 612. 2 Leon. 92. 1 Leon. 89. Co. Lit. 351. a. Godb. 26. 1 And. 60, 61.

(a) *Amner* brought an *Ejectione firmæ* againſt *Nich. Loddington* on a Demiſe made by *Alice Fulleſhurſt* for 7 Years of certain Houſes in *London*, and on Not guilty pleaded, the Jury gave a Spec. Verd. *Hugh Weldon* was ſeiſed of the ſaid Houſes in Fee, and 24 *H.* 8. demiſed them to *Tho. Perpoint* for 99 Years, who by his Will in Writing 1544. deviſed his ſaid Leaſe in theſe Words, *I deviſe my Leaſe to my Wife during her Life, and aft. her Death I will it go to her Children unpreferred*, and made his Wife his Executrix, and died, his Wife entred and was poſſeſſed *ratione doni & legationis*, and married with Sir *Thom. Fulleſhurſt*, and afterwards 2 and 3 *Phil. & Mar. Beſtwick* recover'd againſt Sir *Tho.* 140 *l.* Debt in the Common Pleas, and by Force of a *Fi. fa.* directed to *Altham* and *Mallory* Sheriffs of *Lond.* the ſaid * Term was ſold to *Nich. Loddington* the Defend. and afterw. the Judgm. againſt the ſaid Sir *Tho. F.* was reverſed in a Writ of Error in the King's Bench, *& quod ad omnia quæ amiſit ratione judicii præd' reſtituatur*, and afterw. *Alice* the Wife and Executrix died, *Alice Fulleſhurſt* being then the only Daughter who was unpreferred, entred, and made the Leaſe to the Plaintiff *Tho. Amner*. And this Caſe was often argued at Bar by the Serjeants in the Common Pleas, and at laſt by the Judges, and in this Caſe three Points were by them reſolved. 1. That the ſaid (b) Executory Deviſe of the Leaſe after the Death of the Wife to the Daughter unpreferred, was good; and there is no Difference when the Term, or Leaſe, or Houſes, (c) and when the Uſe, or Occupation, *&c.* is deviſed, and that in all theſe Caſes the executory Deviſe is good. 2. That the Sale either by *Alice* the Wife, or by the Sheriff on the *Fieri facias*, after the Wife was poſſeſſed as Legatory, ſhould not (d) deſtroy the Executory Deviſe, altho' the Perſ. to whom the executory Deviſe was made, was then uncertain, as long as *Alice* the Wife lived; for the ſaid *Alice* the Daughter might have been preferred in her Life, and then ſhe ſhould take nothing, ſo that ſuch Executory Deviſe which has Dependance on the firſt Deviſe may be made to a Perſon incertain, and this Poſſibility cannot be defeated by any Sale made by the firſt Deviſee, *&c.* 3. That the Sale by the Sheriff by Force of the *Fieri facias* (e) ſhould ſtand, altho' the Judgment was after reverſed, and the Plaintiff in the Writ of Error reſtored to the Value, for the Sheriff who made the Sale, had lawful Authority to ſell, and by the Sale the Vendee had an abſolute Property in the Term during the Life of *Alice* the Wife; and altho' the Judgment, which was the Warrant of the *Fieri facias*, be afterwards reverſed, yet the Sale which was a collateral Act done by the Sheriff, by Force of the *Fieri facias*, ſhall not be avoided; for the Judgment was, that the Plaintiff ſhould recover his Debt, and the *Fieri facias* is to levy it of the Defendant's Goods and Chattels, by Force of which the Sheriff ſold the Term which the Defendant

* Co. Lit. 351. a.

(b) 1 Roll. 612. 2 Leon. 92. 3 Leon. 92. Godb. 28. 1 And. 61, 62. Jenk. Cent. 264. Cro. El. 796.

(c) Antea. 95. b. 2 Bulſtr. 192. 2 Bulſtr. 28. March 106. Godb. 26. Swinb. 135. 10 Co. 47. a. b. Plowd. 524. a. Cro. El. 190.

(d) 1 Roll. 937. 2 Bulſtr. 192. 2 Leon. 93. 1 And. 61, 62.

(e) Poſtea. 143. a. 1 Roll. 778. Mo. 573. Dy. 363. pl. 24. Cr. El. 278. Cro. Jac. 246. 5 Co. 90. b. Jenk. Cent. 264. Yelv. 180. 2 Leon. 92. 3 Leon. 89, 90. Godb. 27, 28. Poſtea 143. a.

Defendant had in the Right of his Wife, as he (*a*) well might, and the Vendee pay'd Money to the Value of it. And if the Sale of the Term ſhould be avoided, the Vendee would loſe his Term, and his Money too, and thereupon great Inconvenience would follow, that none would buy of the Sheriff Goods or Chattels in ſuch Caſes, and ſo Execution of Judgments (which is the Life of the Law in ſuch Caſe) would not be done. And according to theſe Reſolutions Judgment was given in the Common Pleas for the Plaintiff, and in the King's Bench upon a Writ of Error the Caſe was often argued at the Bar before Sir *Chriſtopher Wray*, and the Court there, and at length the Judgment was affirmed, and ſo the ſaid three Points were adjudged by both Courts: And by theſe latter Judgments you will better underſtand the Law in the Books, in which there are Variety of Opinions. 37 *H.* 6. 30. 33 *H.* 8. *Br. Tit. Chattels* 33. 2 *E.* 6. *Tit. Deviſe. Br.* 13. 28 *H.* 8. (*b*) *Dyer*, 7. 10 *Eliz. Dyer*, 277. *Plowd. Com. in* Weldon's & Paramor's *Caſe*, &c. *Quia judicia poſteriora ſunt in lege fortiora.*

(a) Co. Lit. 351. a. Poſtea 171. a.

(b) Dy. 7. pl. 8, 9. Antea 95. 2. 1 Bulſt. 191, 192. Moor 758. Wentw. 334. Palm. 334.

Hill. 7 Jacobi Regis.

BASPOLE's *Case.*

2 Brownl. 309, 310. Cr. Jac. 285, 284. 1 Rulstr. 144, 145.

William Freeman brought an Action of Debt on a Bond of 25 *l.* bearing Date 9 *Aprilis An.* 6 *Jac.* against John *Baſpole*, The Defen. demanded Oyer of the Condit. which was, That if the within bounden John Baſpole, &c. ſhall well and truly ſtand to, abide, fulfill, and keep the Award, Arbitrament, Order, Rule, Judgment, and final Determination of Francis Theobald, Gent. indifferently named, elected and choſen, as well on the Part and Behalf of the ſaid John Baſpole, as of the ſaid William Freeman, for to order, judge, rule, and final Determination to make of all Matters, Suits, Debts, Duties, Actions and Demands whatſoever had, made, or depending between the ſaid John and William from the Beginning of the World until the Day of the Date hereof, ſo as the ſaid Award, Order, and final End be made and given up under the Hand and Seal of the ſaid Francis Theobald, to either of the ſaid Parties, at or before the Feaſt of Saint James the Apoſtle, next enſuing, that then this preſent Obligation to be void; and pleaded, That the Arbitrator *nullum fecit Arbitrium*, &c. *de & ſuper Præmiſſis in Conditione præd' ſpecificat'*: The Plaintiff replied, that the Arbitrator 25 *Junii an.* 6. *Reg. nunc*, by his Writing made an Order and Award between the ſaid *William* and *John*, *de & ſuper Præmiſſis prædict' modo & forma ſequentibus*, viz. That whereas a Suit was depending between the ſaid *John Baſpole* and *William Freeman*, for a Debt due by *William Baſpole*, Father of the ſaid *John Baſpole*, deceaſed, to *Robert Freeman*, Father of the ſaid *William Freeman* deceaſed, which juſt Debt was 20 *l.* to be paid by 7 Years then paſt to the ſaid *Rob. Freeman*, and now due to *Wil. Freeman*, as Adminiſtrator of his Father, which Debt the ſaid *J. Baſpole*, *pro bona conſideratione* promiſed

promiſed to pay to the ſaid *Will.* as upon good Proof appear'd to the Arbitrator; That the ſaid *J. Baſpole* ſhould pay to the ſaid *W. Freeman* in Conſideration of the ſaid Debt long due, and for his great Coſts in that Part ſuſtain'd, the Sum of 22 *l.* and that aft. he requeſted the ſaid *J. Baſpole* to pay the ſaid Sum of 22 *l.* which he refuſed, *&c.* up. which the Defend. demurr'd in Law. And 2 Object. were made aga. this Arbitram.; 1. Bec. the Arbitram. was made of (*a*) the one Part, and not of the oth. as in 7 *H.* 6. 40. *b.* that one Party ſhould go quit of all Actions had by the oth. againſt him; and noth. is ſpok. of the Actions which he had againſt the oth. and theref. void. 2. It doth not appear that this Matt. of which he makes the Arbitram. was the Matt. only which was betw. 'em, for the Submiſſion is general of all Actions and Demands, (*b*) *ſo as the ſaid Award be*, &c. So that if he doth not make the Award of all Matters in Controv. the Award is void. To which it was anſwer'd and reſolv'd, That as to the firſt the Award was ſufficient (*c*) and good; for here the Award is as well of the one Part as of the oth. for the one receives Mon. and the oth. is diſcharged of the Debt, and of his Prom. to pay it, and is not like the ſaid Caſe of 7 *H.* 6. for there one would be diſcharged of the Actions, and the other would receive noth. in Satisfact. thereof. *Vid.* (*d*) 22 *E.* 4. 25. *b.* As to the 2d. Object. it was anſwer'd and reſolv'd, 1. That it appears by the Award, that it was made, (*e*) *de Præmiſſis præd' in condicione præd' ſpecificat'*, which Words imply, that he had made an Arbitram. of all that which was referr'd to him, and ſo ſhall it be intended 'till the contra. be ſhew'd and alledg'd by the oth. Party; For when the Submiſſion is gener. of all Actions (*f*) *generale nihil certi implicat*, and theref. it may well ſtand with the Generality of the Words, that there was but one Cauſe depending in Controv. betw. 'em; but where the Submiſſion is of (*g*) cert. Things in ſpecial, and with a Proviſo or Condition, that the Aw. be made, *de Præmiſſ'* &c. or Words which tantamount, there the Arbitrat. ought to make the Award of all, otherwiſe it is void. But if diverſe Things in ſpecial are ſubmitted (*h*) without ſuch condit. Concluſ. the Arbitrat. may make the Aw. of any of them. And as it is of diverſe partic. Things, ſo it is of diverſe partic. Perſons. And theref. if two on the one Part, and one on the oth. Part ſubmit themſ. the Arbitrat. may make an Arbitram. betw. one of the two of the one Part, and the oth. of the oth. Part, and it will be good. 2. Altho' there were many Matters in Controverſy; yet if one only be (*i*) ſignified to the Arbitrator he may make an Award of that, for the Arbitrator is in Lieu of a Judge, and his Office is to determine *ſecund' allegata & probata*, and the Duty of the Parties who are grieved, and know their particular Griefs, is to ſignify their Cauſes of Controverſy to the Arbitrator, for they are privy to them, and the Arbitrator a Stranger, and each ought to do

(*a*) 1 Sand. 327. 1 Roll. Rep. 3, 270. Cro. Jac. 200, 286, 354, 355, 447, 448, 664. Cr. El. 904. 7 H. 6. 40, 41. 2. Hob. 49. Fitz. Arbitrement 2. Br. Arbitrem. 17. Poph. 134. 1 Leon. 72, 73. 1 Roll. 253. Dy. 336. pl. 39.

(*b*) Cr. El. 838, 839, 858. Cr. Jac. 200, 278, 285, 355, 578. Cr. Car. 216. March. Arbitre. 177. Noy 62. 1 Brownl. 58, 112. 2 Brownl. 309, 310. 1 Roll. 256, 257. 1 Roll. Rep. 437. 1 Bulſtr. 123. Aleyn 32. 1 Sand. 323 33. 1 Sid. 252. Hutt. 9, 29. Yelv. 203. Hard. 45. 4 Leon. 94.

(*c*) Dyer 356. pl. 39. 1 Bulſtr. 145. Hob. 49. 1 Roll. 253. 1 Brownl. 58. March. Arbitre. 210. 2 Brownl. 310. Cro. Jac. 447, 448.

(*d*) 2 Roll. Rep. 1. 1 Bulſtr. 123.

(*e*) 1 Sid. 252. Hutt. 9. 1 Roll. Rep. 437. Hob. 191. Cr. El. 839, 858.

Cr. Jac. 200, 278, 578, 664. Cr. Car. 216, 217.

(*f*) 2 Co. 33. b. 2 Roll. Rep. 360. 3 Keb. 414. 2 Sid. 36.

(*g*) Cr. El. 839, 858. Hob. 49. Hardr. 45. Dy. 242. pl. 52. March. Arbitre. 183, 184, 185. Cr. Jac. 200, 355. 4 Leon. 94.

(*h*) Cr. El. 839. Cr. Jac. 200, 355, 664. Hob. 49.

(*i*) Cr. Jac. 200. Hob. 49. March. Arbitrem. 120.

that which lies in his Knowledge, and if other Conſtruction ſhould be made, many Arbitraments might be avoided; for one might conceal a Treſpaſs committed, or other ſecret Cauſe of Action given him, and ſo avoid the Award, *Et expedit Reipublicæ* (a) *ut ſit finis Litium.* And this is like *Cullamor*'s Caſe on the * Statute of Bankrupts, in the Second Part of my *Reports*, *fol.* 25 & 26. *b.* which provides, that equal Diſtribution ſhall be made of the Bankrupt's Goods between all the (*b*) Creditors, but that is, (as it is there reſolved) to be intended of thoſe who will come in and ſignify their Debts. And hereby you will better underſtand your Books in 39 *H.* 6. 9. 22 *E.* 4, 25. 19 *H.* 6. 6. *b.* 2 *R.* 3, 18. 4 *Eliz. Dyer* 216. 8 *Eliz. Dyer* 242.

(a) 6 Co. 7. a. 9. a. 45. a. 8 Co. 37. b. 9 Co. 79. b. 11 Co. 69. a. 3 Bulſtr. 98. Godb. 242. Hard. 128. Co. Lit. 103. a.

* 13 El. cap. 7.

(*b*) Cro. Jac. 200. 2 Brownl. 210, 211. Hob. 287. Hutt. 37, 38.

Hill.

Hillarii 7 Jacobi *Regis.*

Sir RICHARD LECHFORD's *Caſe.*

IN an Ejectment in the King's Bench by *Thomas Undrell*, Plaintiff, and *Briſtow Elſey* Defendant, on a Demiſe made by *Will. Copley*, 2 *N. Anno* 2 *Jac. Reg.* of a Houſe, and 20 Acres of Land, *&c.* in *Lee* in the County of *Surrey*, for the Term of one Year; the Defendant pleaded, that *R. Lechford* Knt. was ſeiſed of the Tenements in which, *&c.* in his Demeſne as of Fee, and leaſed them to the Defendant for his Life, and that *Will Copley* diſſeiſed him, and made the Leaſe to the Plaintiff, and that the Defendant re-enter'd, *&c.* and the Plaintiff reply'd and ſaid, that the Tenements in which, *&c.* are, *& a tempore cujus* &c. were Parcel of the Mannor of *Sherwood* in *Lee* aforeſaid, whereof *Henry Lechford*, Eſq; was ſeiſed, and that the ſaid Tenements in which, *&c.* are, *& a tempore cujus* &c. were demiſed and demiſable, *&c.* by Copy of Court-Roll, *&c.* And that the ſaid *Henry Lechford* at the Court of his Manor, *Anno* 2 *Eliz.* granted the ſaid Tenements to *Tho. Copley*, Father of the ſaid *William Copley*, to have and to hold to him and his Heirs, by Copy of Court Roll, *&c.* And afterwards the ſaid *Thomas Copley* dy'd ſeiſed thereof of ſuch Eſtate, which deſcended to the ſaid *William Copley* his Son and Heir, the Leſſor, *&c.* the Eſtate of the ſaid *Henry Lechford* in the ſaid Manor the ſaid Sir *Rich. Lechford* Knt. now has, who entred upon the Poſſeſſion of the ſaid *William Copley* the Son, and ouſted him of the Tenements, in which, *&c.* and demiſed them to *Briſtow Elſey*, as is aforeſaid, upon whom the ſaid *William Copley* re-enter'd and demiſed them to the Plaintiff, *&c.* To which the Defendants rejoyn'd and confeſs'd, that the Tenements in which, *&c.* were Parcel of the Manor, and demiſed and demiſable, *&c.* and the Grant by Copy made to

Cr. Jac. 226, 227.

the ſaid *Thomas Copley*, and the Deſcent to *William Copley*, *prout*, &c. But further he ſaid, That within the ſaid Manor there is, *& a tempore cujus* &c. was ſuch a Cuſtom, That if any cuſtomary Tenant of the ſaid Manor dies ſeiſed of any Lands, or Tenements, held by Copy, *&c.* in Fee-ſimple, *&c.* that every Heir of ſuch Tenant ſo dying ſeiſed, ſhall (a) Cr. Jac. 226. pay a reaſonable (*a*) Fine for his Admittance to be in full Court of the ſaid Mannor by the Lord or his Steward impoſed and aſſeſſed; and further within the ſaid Manor there is another Cuſtom *a tempore cujus*, &c. That if any Copyhold Tenant, ſeiſed of any Lands or Tenements held by Copy, *&c.* of the ſaid Manor in Fee-ſimple dies thereof ſeiſed, and his Heir doth not come at the next Court of the ſaid Manor, and claim the ſaid Tenements, and pray to be admitted to them, *&c.* then a (*b*) publick Proclamation ſhall be made in full Court that the ſaid Heir come at the ſame Court to claim the ſame Lands, and to pray to be admitted, and ſo at two other Courts following of the ſaid Manor, the like Proclamation ſhall be made; and if ſuch Heir at any of the ſaid Courts in which Proclamation ſhall be ſo made, comes not to claim the ſaid Tenements, and pray to be admitted to them, then the Lord of the Manor has always uſed and accuſtomed to ſeiſe them into his Hands, as forfeited to him, and pleaded, that three Proclamations were made at three ſeveral Courts, *&c.* according to the Cuſtom; and the ſaid *William Copley*, Son and Heir of the ſaid *Thomas Copley*, came not to any of them to claim the ſame Lands, and pray to be admitted to them; wherefore the ſaid Sir *Richard Lechford* then and yet Lord of the ſaid Manor, (c) Co. Lit. 59. a Bridgm. 52. ſeiſed the Tenements aforeſaid, in which, *&c.* as (*c*) forfeited to him, and leaſed them to the Defendant, as aforeſaid. To which the Plaintiff ſaid, That the ſaid *Thomas Copley primo Julii*, 27 *Eliz.* dy'd, as is aforeſaid, ſeiſed of the ſaid Tenements, after whoſe Death the Tenements aforeſaid, in (d) Cart. 74. which, *&c.* (*d*) deſcended to the ſaid *Will. Copley*, as aforeſaid; and that at the Time of the Death of the ſaid *Thomas Copley*, and at the Time of the ſaid ſeveral Proclamations, the ſaid *William Copley* was Reſident at *Bruxels* beyond the Seas, *extra quatuor maria, & ibi per totum tempus remanebat*, and there for all the ſaid Time remained 'till the firſt Day of *September*, *Anno* 1 *Jac. Reg.* which Day he returned from *Bruxels* aforeſaid, into *England*; and that immediately after his Return to *Lee* aforeſaid, then having Notice, and not before, of the Death of the ſaid *Thomas Copley*, the ſaid *William* 30 *Sept.* 1 *Jac.* came to the ſaid Sir *Richard Lechford*, then Lord of the ſaid Manor, and prayed to be admitted to the Tenements aforeſaid, in which, *&c.* and offer'd the ſaid Lord any reaſonable Fine for his Admittance to them, which the ſaid Lord utterly refuſed, *&c.* Upon which the Defendant demurred in Law; and it was adjudged

that this Custom and Non-Claim * should not bar him, who was beyond Sea *(extra maria)* at the Time of the Proclamations made of his Inheritance, because he who is out of the Realm could not have *(a)* Knowledge by Intendment of Law of the Death of his Father, nor of the Proclamations made, to warn him to come to claim his Inheritance, and pray to be admitted to it. And it appears by the Statute *de modo levandi fines*, made *(b)* 18 *E.* 1. That a Fine levied of Lands in the Common Pleas, is as high a Bar, and of as great Force, and of so high Nature in itself, that it bars not only those who are Parties and Privies to the Fine and their Heirs, but all other People of the World who are of full Age, out of Prison, of good Memory, and within the four Seas the Day of the Fine levied, if they do not make their Claim within the Year and Day, *&c.* And it appears also by the Statute *de Donis Conditionalibus*, made *(c)* 13 *E.* 1. upon which it was concluded, That if the Sublimity of a Fine, which is so high a Bar, and of so great Force, and of so puissant a Nature, and which hath such Solemnity in so high a Court of Record, shall not bar him who is out of the Realm of his Right; *a fortiori* Proclamations made in a base Court in a private Corner, shall not bar him. So Judgment final in a Writ of *(d)* Right in the Common Pleas shall bind all Strangers, if they make not their Claim within the Year and Day after the Judgment and Execution; and yet the Common Law excepts Infants, those who are out of the Realm, or are imprisoned, *&c.* and therewith agree 5 *E.* 3. 222. and 7 *E.* 3. 335. that the Year and Day shall be accounted after the *(e)* Execution, for by the Transmutation of the Possession, the Country has Notice of it. *Vide* 4 *E.* 3. 46. *&* 11 *R.* 2. *Escheat* 13. *Plow. Com.* 356. And the Reason why a Recovery in a Writ of Right where the Trial was by Battle or Grand Assise, was final to all Strangers, is, for the grand Notice that Men have of Battle, and of the Trial by Grand Assise, their Proceedings and Performance are with so notorious, famous, and publick Solemnities, and if such Recovery with such Solemnities should not bar him who was out of the Realm, nor Infants, nor a Man *non sanæ memoriæ*, nor a Man in Prison; *a fortiori* Custom and Proclamations in a private Court of a Manor shall not bind them. And the Law in these Cases was grounded upon great Reason, for he who is out of the Realm, in another Country, can't by Intendment of Law have Notice of Things done within this Realm; an Infant has not Understanding, nor can know his Right either to follow it by Entry, or Action; so of a Man *non sanæ memor'* who wants Reas. and Sense to make a Claim; so of him who is imprif. who by Judgm. of Law ought to be *in salv' (f) & arct' Custod' sc. Salv'* as to the Party at whose Suit he

* Cr. Jac. 226.

(a) Cr. Jac. 226.

(b) 2 Inst. 510, 511.

(c) Co. Lit. 262. a 2 Inst. 331, 332, 333.

(d) Co. Lit. 254. b 5 Co. 107. b.

(e) 1 Co. 96. b. 97. a Plowd. 357. b.

(f) 3 Co. 44. a Hard. 30. 2 Inst. 381. Dalt. Sher

14. Co. Car. 466. 1 Rolls. 807. 3 Inst. 35. Co. Lit. 260. a. 9 Co. 87. b.

is impriſon'd, bec. he ought to be impriſon'd ſo ſtrong that he may not eſcape; and *artta*, in Reſpect he ought to be kept cloſe, with. Confer. with others, or (*a*) Intelligence of Things abroad; and he ought not to go out of the Priſ. to make his Claim. And that is the Reaſ. that a Recovery (*b*) by Default againſt him in a real Action ſhall not bind him, but he ſhall reverſe it by Error, as it appears in 5 *Ed.* 3. 50. *b.* 4 *Ed.* 2. *Diſceit* 51. *Lit.* 102. *b.* *Nota*, Reader, that a (*c*) Feme Covert is not mentioned in any of the ſaid Acts, but was bound at Com. Law by Non-claim, bec. ſhe had a Husb. who might make it, and that was one of the Reaſons that the Stat. of 34 *Ed.* 3. *c.* 16. ouſted Non-claim: but the Stat. of 4 *H.* 7. *cap.* 24. excepts (*d*) Feme Coverts who are Strangers to the Fine, ſo that ſhe makes her Claim within 5 Years aft. the Death of her Husb. And at the Com. Law, Men out of the (*e*) Realm, Infants, Men *non ſanæ memoriæ*, and in Priſon, who were not bound to make Claim with. the Year and Day, were perpetually for them and their Heirs exempt. from making Claim. And theref. it was reſolv'd, That the ſaid Cuſtom in the Caſe at Bar is ſo to be intended, that it ſhall bind him who doth not make his Claim, *&c.* if he be within the Realm, * of full Age, of perf. Memory, and out of Priſon; for no Cuſtom by the Law can extend to bar thoſe, who by Judgm. of Law are not bound to make Claim. But it was reſolved, that if *Will. Copley* had been with. the Realm at the time of the firſt Proclamation, and afterw. (*f*) gone out of the Realm, that the Proclamation ſhould bind him, altho' he be *extra quatu' maria*, at the Time of the oth. Proclamations, for he ſhall not defeat the Lord of his Fine or Forfeit. by his own Act. *Vide* 9 *H.* 7. 24. *a.* and the Reaſ. of *Litt. lib.* 3. *fol.* 104. *a.* was well obſerv'd, who hav. put the Caſe of Non-claim of him who is out of the Realm that it ſhall not hurt him in the Caſe of Fine, he ſaith as follows, by greater Reaſ. *&c.* (*g*) That a Diſſeiſ. and a Deſcent, which is Matt. in Fact, ſhall not ſo much grieve him who is ſo diſſeiſ. when he was out of the Realm at the Time of the Diſſeiſin, and alſo at the Time that the Diſſeiſ. died ſeiſed, but that he may well ent. notwithſt. the Deſcent; upon which 2 Things were collected. 1. That as at the Com. Law, If a Man was with. the Realm at the Time of the Fine levied, and with. the Year went bey. the Seas he ſhould be bound; So if a Man be diſſeis'd, and afterw. goes bey. the Seas, a Deſc. caſt afterw. ſhall toll the Entry, as appe. alſo by *Litt.* 103. *b.* (*h*) The 2d Thing is, That if he who is out of the Realm ſhall not be bound by Non-claim on a Fine, which is a Matter of Record, *a fortiori* he ſhall not be bound by Non-cl. on a Deſc. which is a Matt. in *Pais.* (*i*) If a Man be diſſeiſed and afterwards is impriſoned, and afterwards a Deſcent is caſt, it ſhall toll his Entry, and therewith agrees 9 *H.* 7. 24. *a.* And (*k*) ſome ſay in this Caſe, that if a Man be ſeiſed of Land, and has Iſſue two Sons, Baſtard eigne and Mulier puiſne, and the Fath. dies ſeiſed, the Mulier being beyond

(*a*) 9 Co. 87. b. Co. Lit. 259. a. Plowd. 360. a.
(*b*) Lit. Sect. 438. Co. Lit. 259. b. Lit. 102. b. 7 H. 6. 38. a. b. Fitz. Default 1. Br. Default 33. Plowd. 360. a.
(*c*) Hob. 95. Plowd. 360. a. & Lit. 262. b.
(*d*) 9 Co. 140. b.
(*e*) 1 Roll. 567. Plowd. 360. a. Hob. 95.
* 3 Mod. 221. &c. 1 Show. 31, 83. Salk. 386. Comb. 118. Lutw. 765.
(*f*) Cr. Jac. 101.
(*g*) Co. Lit. 262. b. Lit. Sect. 441.
(*h*) Co. Lit. Sect. 440.
(*i*) Lit. Sect. 437.
(*k*) Plow. 372. a.

beyond Sea, or within Age, or impriſon'd, or *non ſanæ memoriæ*, and the Baſt. eigne enters, and continues in peaceable Poſſeſſion of the Lands, and has Iſſue, and dies, and the Lands deſcend to his Iſſ. the Right of the Mul. in all the ſaid Caſes is bound for ever; and ſome hold the contrary. 2. It was reſolved, That foraſmuch as *Will. Copley* was out of the Realm at the Time of the Death of his Father, altho' he was not in the King's Service, yet he ſhall not be (*a*) barred by the ſaid Cuſtom and Proclamations, becauſe he could not by Intendment of Law have notice; and at the Comm. Law he ſhould not be barred by Non-claim on a Fine, or Writ of Right, *Bract. lib.* 5. *tract. de Exception' Cap.* 29. *fol.* 436. (*b*) *Excuſatur quis quod clameum non appoſuerit, ut ſi in toto tempore litigii fuit ultra mare quacunq; occaſione: Littl. acc. fol.* 103. *a. Vide* 9 *H.* 4. 3. *a.* 26 *H.* 6. *Error*, 27. 33 *H.* 6. 1. 1 *Aſſ. p.* 2. 21 *H.* 6. 24. 2 *E.* 3. *Coron.* 153. *The Preamble of the Statutes of* 26 *H.* 8. *cap.* 13. *&* 5 *&* 6 *E.* 6. *cap.* 11. Note, Reader, as to thoſe Caſes which have been put of Baſtard eigne and Mulier puiſne, I conceive that the better Opinion is, That in ſuch Caſes the (*c*) Mulier ſhall be barred for ever; and the Reaſon is, becauſe the Continuance in Poſſeſſion, and dying ſeiſed in Peace, and Deſcent to his Iſſue makes him Heir, and his Iſſue ſhall inherit as Heir, becauſe he was legitimate by the Law of holy Church; for (as *Bracton, lib.* 2. *fol.* 63. ſaith) (*d*) *Matrimonium ſubſequens legitimos facit quoad ſacerdotium* (becauſe they are legitimate by the Canon Law) *non* (*e*) *quoad ſucceſſionem, propt' conſuetudinem regni quæ ſe habet in contrarium.* And by the Law of *England* by the Continuance in Poſſeſſion, and dying ſeiſed in Peace and Deſcent, *&c.* he is adjudged (*f*) Heir to his Father, for altho' the Baſtard dies ſeiſed without Iſſue, ſo that the Land doth not deſcend, the Mulier ſhall have it; and therewith agrees *Abridgm. Aſſiſ. fol.* 3. and the Rule in 13 *E.* 1. *Baſtardy* 28. is ſo to be intended, (*g*) *Juſtum non eſt aliquem antenatum mortuum facere Baſtardum, qui toto tempore ſuo pro legitimo habebat'. Vide* 39 *E.* 3. 14. *&* 39 *Aſſ. p.* 10. And in the Caſe of Legitimation (which is in Law ſo precious and of ſo great Eſtimat.) the Law doth not reſp. Infancy, or oth. Defects in the Mulier, but prefers Legitimation of Blood before any Benefit of temporal Inheritance, and therefore the Law ſaith, That by the Death of the Baſtard eigne in Peace, he becomes right Heir, and by Conſequence the Mulier is barred. *Vide* 5 *E.* 2. *Br. Deſcent* 49. * 31 *Aſſ. p.* 18. *&* 22. *John Alleyn's* Caſe; *&* 33 *E.* 3. *Verdict* 48. the ſame Caſe. * 36 *Aſſ. p.* 2. *Plow. Com. Stowel's* Caſe. *Vide* 10 *E.* 3. 2. the dying ſeiſed of the Baſtard eigne binds the (*h*) Right, and the Deſcent not only takes away the Entry, but the Right alſo; and therefore a Deſcent in that Caſe may be a Bar to the Right, when it ſhall not take away the Entry in Caſe of Diſſeiſin, as a Deſcent of (*i*) Services, Rent, Reverſion expectant on an Eſtate Tail, *&c.*

(*a*) Ct. Jac. 226. Palm. 533.

(*b*) Co. Lit. 260. b. 261. a.

(*c*) Co. Lit. 244. a.

(*d*) Co. Lit. 245. a.

(*e*) Co. Lit. 245. a.

(*f*) Co. Lit. 244. a.

(*g*) Co. Lit. 244. a.

* Plowd. 372. a. Br. age 37. Br. diſcent 26. Br. entre congeable 68.

* Plowd. 372. a. Fitz. Baſtard. 17. Br. diſcent 29. Br. entry congeable 75.

(*h*) Co. Lit. 244. a. Plowd. 372. a.

(*i*) Co. Lit. 244. a.

ſhall

(a) Co. Lit. 15. a. 244. a.

shall bar (*a*) the Right of the Mul. as appears in 18 *E.* 2. *Bast.* 26. but such Desc. shall not take away the Entry or Claim of the Disseisee; and so in man. oth. Cases, as appears by the Books

(b) Co. Lit. 244. a.

afterw. cited in this Case. And if a Man has two (*b*) Daughters, Bastard eigne, and Mul. puisne, and they enter and occupy as Heirs, now the Law in Favour of Legitimat. will not adjudge the whole Possession in the Mul. who then had the sole Right,

(c) Co. Lit. 244. a.

but in both: So that if the (*c*) Bast. dies seised, her Issue shall inher. and therew. agrees 17 *E.* 3. 59. abridg. by *Fitz.* tit. *Bast.* 32. And if in the same Case the Daughters, *sc.* the Bast. eigne and

(d) Co. Lit. 170. b. 244. b.

Mulier puisne enter, and make (*d*) Partit. this Partit. shall bind the Mulier for ever, 2 *E.* 2. *Bast.* 19. 21 *E.* 3. 34. *b.* 30 *Ass. p.* 7. but if Partition be made betwixt two Daughters, where one has no Colour, as to a special Estate Tail, there the Partition is void, 11 *Ass. p.* 23. *Hugh de Wimondham's* Case. And an

(e) Co. Lit. 244. b. 8 Inst. 97.

Assise of (*e*) *Mortdancester* doth not lie betw. the Mul. and the Bast. eigne, no more than betw. 2 Brothers; and therew. agrees *Britton cap.* 70. and if the Bastard eigne enters, and is seised of Lands as Heir, he shall be vouched as Heir, and if he be with.

(f) Br. voucher 154. Co. Lit. 244. b. 2 Rolls 397. 21 E. 3. 46. a. 5 H. 7. 2. a.

Age the Parol shall demurr, 20 *Edw.* 3. *Voucher* 129. And if a Man has Issue Bast. eigne and Mulier puisne, and dies, and the Bast. with. Age enters and is impleaded, he shall have his (*g*) Age; and therew. agrees the Book in 11 *E.* 3. *Age* 3. Which

(g) Co. Lit. 244. b. 7 Rolls 245.

Cases prove, That when the Bast. eigne enters into the Lands,

(h) Co. Lit. 244. a.

until he be interrupted, he is accounted Heir, altho' the Mulier be with. Age, for when the Bastard eigne is within Age, of Necessity the Mul. puisne also ought to be within Age. *Vide* 5 *H.* 7. 2. And if a Man has Issue Bast. eigne and Mul. puisne, and the Bastard has Issue, and dies in the Life of his Fath. and afterw. the Fath. dies, and the Issue of the Bast. enters and dies without Interruption; some say it shall bar the Mulier. So if a Bastard born before Marriage enters, and has Issue, and dies seised, it shall bar (*h*) the collat. Heir, and the Lord by Esch. as well as the Mulier puisne; So if the Bast. eigne enters and dies seised, his Wife with Child with a Son, and afterw. the Son is born, he shall inherit the Land, for in as much as his Father died in Possession without Interruption, the Mulier shall not alledge against the Issue Bastardy in his Father who is dead.

(i) Co. Lit. 244. a.

And if the Bastard eigne dies seised, and his Issue (*i*) endows the Wife of the Bastard; yet the Mulier shall not enter upon the Tenant in Dower, for the Right of the Mulier was barred by the dying seised and the Descent: Otherwise it is of a Descent which tolls Entry only, and not the Right. The same Law in the Case aforesaid, if the Wife of the Father of the Bast. eigne and Mul. puisne be endowed, yet the Iss. of the Bast. shall have the Reversion of it, *Cauf. qua supr. Vid.* 10 *E.* 3. *Waste* 142. 20 *H.* 3. *Bast.* 29. 2 *Ass. p.* 9. 14 *E.* 2. *Bast.* 26. 13 *E.* 1.

13 *E.* 1. *Baſtardy* 28. 32 *E.* 1. *Baſtardy* 31. 39 *E.* 3. *The laſt Caſe.* 36 *Aſſ. p.* 2. 6 *E.* 3. 54. Abridg. tit. *Faux Recov.* 2. 10 *E.* 3. 2. *Plowd. Com. Talbois's* Caſe, 57. and *Stowell's* Caſe, 373, 374.

Note, Reader, the Reaſon why the younger Son who is born during the Marriage of a lawful Wife is called Mulier puiſne, *ſeu Filius Mulieratus*, is, becauſe this Word (*a*) (*Mulier*) in Latin has three Significations. 1. *Sub nomine Mulieris continetur qualibet Fœmina.* 2. *Proprie continetur Mulier qua Virgo non eſt.* 3. *Appellatione Mulieris in Legibus Angliæ continetur Uxor.* (*b*) So that, *Filius natus ex juſta Uxore appellatur in Legibus Angliæ, Filius mulieratus*; (*c*) *ſicut Baſtardus dicitur a Græco vocabulo, Baſſaris*, i. e. *Meretrix, ſeu Concubina, quia procreatur ex Meretrice ſive Concubina.* And therewith agrees *Glanvil. l.* 7. *c.* 1. *Quod ſi verum eſt*, &c. *tunc melioris conditionis eſt in hoc baſtardus Filius quam mulieratus*, &c. where he makes an Oppoſition of a Son Mulier, to a Baſtard Son, and there Mulier is taken for Legitimate, *procreat. de Uxore, & Baſtardus ex Meretrice ſive Concubina.* And therewith agrees *Britton, cap.* 70. of *Mortdanceſter, fol.* 81. *b.* where he ſaith, in the ſame Manner, of two Brothers of divers Mothers, and between a Brother Mulier and a Brother Baſtard, *&c.* And the Books in 32 *E.* 1. *Baſtardy* 31. 6 *E.* 2. *Baſtardy* 24. 39 *E.* 3. 14. 39 *Aſſ. p.* 10. 44 *E.* 3. 12, &c. *Littleton ubi ſupra*, &c.

(*a*) Co. Lit. 243. b.

(*b*) Co. Lit. 243. b.

(*c*) Co. Lit. 243. b.

Trin.

Trin' 7 Jac. Rot. 3661.

JOHN TALBOT's *Case.*

Salop. JOhannes Pendleton attachiatus fuit per breve Domini Regis de Secunda deliberatione ad respondend' Johanni Chapman de placito quare cepit averia ipsius Johannis Chapman & ea injuste detinuit contra vad' & pleg' &c. Et unde idem Johannes Chapman per Tho. Salter Attornat' suum queritur, quod præd' Johannes Pendleton secundo die Septembris Ann' regni Domini Regis nunc Angliæ &c. sexto apud Albrighton in quodam loco vocat' Bromley, cepit averia, viz. duas juvencas ipsius Johannis Chapman, Et ea injuste detinuit contra vad' & pleg' quousque &c. unde dic' quod deteriorat' est & dampnum habet ad valentiam vigint' librar', Et inde produc' sectam &c. Et prædict' Johannes Pendleton per Nich. Gibbens Attornat' suum venit & defend' vim & injur' quando &c. Et ut Ballivus Johannis Talbot Armigeri bene cogn' captionem averiorum prædict' in præd' loco in quo &c. Et juste &c. Quia dic' quod idem locus in quo supponitur captionem averiorum prædict' fieri continet & prædict' tempore captionis illius superius fieri suppositi' continebat in se tres acras pasturæ jacen' in prædicto campo voc' Bromley in Albrighton prædicta, Quodque diu ante prædictum tempus quo supponit' captionem averiorum prædictorum fieri quidam Johannes Chapman pater jam queren' fuit seisitus de prædictis tribus acris pasturæ cum pertin' in quibus &c. in dominico suo ut de feodo, & easdem tres acras pasturæ cum pertin' in quibus &c. tenuit de præfato Johanne Talbot ut de manerio suo de Albrighton in comitatu prædicto per fidelitatem ac servitium faciend' sectam ad cur' ipsius Joh. Talbot manerii sui prædicti de tribus septimanis in tres septimanas

nas, apud manerium illud annuatim tenend', necnon per ſervitium reddendi poſt mortem cujuſlibet tenentis earundem trium acrarum paſturæ cum pertinentiis, in quibus, &c. deceden' inde ſeiſit' optimum animal quod fuerit hujuſmodi tenen' tempore mortis ſuæ nomine Heriotti, de quibus quidem ſervitiis prædictus Johannes Talbot fuit ſeiſitus per manus prædicti Johannis Chapman pr'is, ut per manus veri tenentis ſui, viz. de fidelitate & ſecta Curiæ prædict' ut de feodo & jure, Ac de Heriotto prædict' in dominico ſuo ut de feodo: prædictuſque Johannes Chapman pater de prædictis tribus acris paſturæ cum pertinentiis in quibus, &c. in dominico ſuo ut de feodo in forma prædicta ſeiſit' exiſten', poſtea & ante prædictum tempus quo &c. apud Albrighton prædictam de tali ſtatu ſuo obiit inde ſeiſit': Et idem Johannes Pendleton ulterius dicit, quod prædictus Johannes Chapman pater tempore mortis ſuæ apud Albrighton prædict' fuit poſſeſſionat' de uno bove (*a*) pretii centum ſolidorum ut de bove ſuo proprio, qui quidem bos fuit optimum animal prædicti Johan' Chapman patris tempore mortis ſuæ, per quod accidit inde Heriot' præfato Johanni Talbot, Et quia Heriottum prædict' poſt mortem prædicti Johannis Chapman patris dicto tempore quo &c. præfato Johanni Talbot aretro fuit minime deliberat', idem Johannes Pendleton ut Ballivus præd' Johannis Talbot bene cogn' captionem averiorum prædictorum in prædicto loco in quo &c. Et injuſte &c. pro Heriotto prædicto non deliberat' ut infra feodum & dominium ſua &c.

(*a*) Cro. Car. 260. Plow. 94. a.

Et prædictus Johannes Chapman jam querens dicit, quod prædictus Johannes Pendleton ut Ballivus prædicti Johannis Talbot ratione præ-allegata captionem averiorum prædictorum in prædicto loco in quo &c. juſtam cogn' non debet, Quia dicit, quod diu ante prædictum tempus captionis prædictæ factæ, & antequam prædictus Johannes Chapman pater aliquid habuit in prædict' trib' acris paſturæ cum pertin' in quibus &c. quid' Johannes Barny fuit ſeiſitus de uno meſſuagio & dimid' unius virgat' terræ, prati, & paſturæ cum pertinent', contin' per æſtimat' quinquaginta acras in Albrighton præd', unde præd' tres acræ paſturæ cum pertinentiis in quibus &c. fuerunt parcell', in dominico ſuo ut de feodo, Et eadem meſſuagium & dimid' unius virgat' terr', prati, & paſturæ integr' cum pertinen' unde &c. tenuit de præfato Johanne Talbot ut de manerio ſuo de Albrighton prædicta per fidelitatem, Ac per ſervitium faciendi ſectam ad curiam ipſius Johannis Talbot manerii ſui præd' de trib' ſeptimanis in tres ſeptiman' apud manerium illud annuat' tenend', necnon per ſervitium reddendi poſt mort' cujuſlib' tenentis eorund' meſſuagii & dimid' virgat' terræ, prati, & paſtur' integr' cum pertinentiis unde &c. decedentis inde ſeiſit' optim' animal quod

fuit

fuit hujuſmodi tenentis tempore mort' ſuæ nomine Heriotti, prædictuſque Johan' Barney de prædict' meſſuagio & dimid' unius virgat' terræ, prati, & paſturæ integr' cum pertinentiis unde &c. in forma prædict' ſeiſit' exiſten' diu ante prædict' tempus captionis &c. ſcilicet, primo die Maij, Anno regni Dominæ Elizab' nuper Reginæ Angliæ, triceſimo ſecundo, de tribus acris terræ parcell' præd' dimid' unius virgat' terræ, prati, & paſturæ cum pertinentiis unde &c. feoffavit prædict' Johannem Talbot, habend' & tenend' eidem Johanni Talbot & hæredibus ſuis imperpetuum: virtute cujus feoffamenti præd' Johannes Talbot fuit & adhuc eſt ſeiſit' de eiſdem trib' acris terræ parcell' &c. in dominico ſuo ut de feodo, ipſoq; Johanne Talbot ſic inde ſeiſit' exiſten' ac prædict' Johanne Barney de meſſuagio prædict' ac reſid' prædict' dimid' unius virgat' terræ, prati, & paſturæ cum pertinentiis unde &c. in forma prædicta ſeiſit' exiſtent', idem Johannes Barney poſtea & ante prædictum tempus captionis prædict' fc'æ, ſcilicet, primo die Maii, anno regni dictæ nuper Reginæ Elizab. triceſimo ſexto de prædict' tribus acris paſturæ cum pertinentiis in quib' &c. feoffavit prædictum Johannem Chapman patrem, habendum & tenendum eidem Johanni Chapman patri & hæredibus ſuis imperpetuum, ad opus & uſum dicti Johannis Chapman patris & hæredum ſuorum imperpetuum: virtute cujus quidem feoffamenti idem Johannes Chapman pater fuit ſeiſitus de eiſdem tribus acris paſturæ cum pertinentiis in quibus &c. in dominico ſuo ut de feodo, Et ſic inde ſeiſitus exiſtens idem Johannes Chapman pater poſtea & ante prædict' tempus captionis &c. apud Albrighton præd' de tali ſtatu ſuo de & in eiſdem tribus acris paſtur' cum pertinen' in quibus &c. obiit inde ſeiſitus, poſt cujus mortem prædict' tres acræ paſtur' cum pertinen' in quibus &c. deſcend' eidem Johanni Chapman jam querent' ut filio & hæredi prædicti Johannis Chapman patris, per quod idem Johannes Chapman jam querens in prædict' tres acras paſtur' cum pertinentiis in quibus &c. intravit, & fuit, & adhuc eſt inde ſeiſit' in dominico ſuo ut de feodo, Et ſic inde ſeiſitus exiſten' idem Johannes Chapman jam querens ante prædict' tempus captionis poſuit averia ſua præd' in prædicto loco in quo, &c. ad herbam in eodem tunc creſcent' depaſcend', prout ei bene licuit, quæ quidem averia fuerunt in prædicto loco in quo &c. herbam in eodem tunc creſcen' depaſcen' quouſque prædictus Johannes Pendleton prædict' ſecundo die Septembris anno regni domini Reg' nunc Angl', &c. ſexto ſupradicto apud Albrighton prædictam in prædicto loco vocat' Bromley cepit averia ipſius Johannis Chapman prædict' & ea injuſte detinuit contra vad' & pleg' quouſque &c. prout ipſe ſuperius verſus eum queritur: Et hoc paratus eſt verificare, unde ex quo prædict' Johannes Pendleton captionem averiorum prædictor' in præd'

loco

loco in quo &c. præcludend', quodque ipſe ad placitum illud modo & forma prædictis placitat' neceſſe non habet nec per legem terræ tenetur reſpondere, unde pro defectu ſufficient' placiti in barr' in hac parte, idem Johannes Pendleton petit judicium & retorn' averiorum prædictorum una cum dampnis &c. ſibi adjudicari. Et prædict' Johannes Chapman jam querens ex quo ipſe ſufficientem materiam in lege ad prædictum Johannem Pendleton a juſte cognoſcend' captionem averiorum prædict' in prædicto loco in quo &c. præcludend' ſuperius allegavit, quam ipſe paratus eſt verificare, quam quidem materiam prædictus Johannes Pendleton non dedic', nec ad eam aliqualiter reſpond', ſed verificationem illam admitt' omnino recuſat, ut prius petit judicium & damna ſua occaſione captionis & injuſte detentionis averiorum illorum ſibi adjudicari &c. Et quia Juſtic' hic ſe adviſare volunt de & ſuper præmiſſis priuſquam judicium inde reddant, dies datus eſt, &c.

Hill.

Hill. 7 Jacobi Regis.

JOHN TALBOT's *Case.*

2 Brownl. 293, 294. 10 Co. 102. a. b.

JOHN *Chapman* brought a Writ of *Second Deliverance* againſt *John Pendleton*, of two Heifers taken at *Albrighton*, in a Place called *Bromley* in *Albrighton*, in the County of *Salop*, &c. The Defendant made Conuſans as Bailiff to *John Talbot*, Eſq; and ſaid, That the Place where, *&c.* contain'd three Acres of Paſture, lying in a Field called *Bromley*, in *Albrighton*; and that one *John Chapman*, Father of the ſaid *John Chapman*, whoſe Heir he is, was ſeiſed of the ſaid three Acres of Paſture in Fee, and held them of the ſaid *John Talbot*, as of his Manor of *Albrighton* in the ſaid County by Fealty, and Suit of Court to the Manor from three Weeks to three Weeks, and by the Service to render after the Death of every Tenant of the ſaid three Acres of Paſture, in which, *&c.* dying thereof ſeiſed, *optimum Animal* ſuch Tenant had at the Time of his Death *nomine Heriotti*, of which Services he was ſeiſed by the Hands of the ſaid *John Chapman* the Father, as by the Hands of his very Tenant, *&c.* and the ſaid *John Chapman* the Father ſo being thereof ſeiſed, died ſeiſed thereof, and that at the Time of his Death he was poſſeſſed of an Ox, of the (*a*) Price of 100 *s.* as of his proper Ox, which Ox *fuit optim' Animal* of the ſaid *J. Chapman* the Fath. which he had at the Time of his Death, *&c.* And becauſe the ſaid Heriot was behind, and not delivered, the Defendant, as Bailiff of the ſaid *John Talbot*, acknowledg'd the taking of the Cattle aforeſaid, in the Place where, *&c.* as *infra feodum & dominium ſuum*, &c. In Bar of which the ſaid *J. Chapman*, now Plain. ſaid, That bef. the ſaid *J. Chapman* his Father had any Thing in the ſaid three Acres of Paſture, one *John Barny* was ſeiſed of a Houſe, and a half Yard

(*a*) Antea 103. a. Cr. Jac. 260. Plowd. 94. a.

of

of Land, Meadow and Paſture, containing by eſtimation 50 Acres, in *Albrighton* aforeſaid, whereof the ſaid 3 Acres of Paſture in which, *&c.* were Parcel, in his demean as of Fee, and the ſaid Houſe and half yard of Land, Meadow and Paſture intire held of the ſaid *John Talbot*, as of his ſaid Manor by Fealty, Suit to Court, and Heriot Service, after the Death of every Tenant dying thereof ſeiſed; and the ſaid *John Barny* being ſo ſeiſed of the ſaid Meſſuage and half yard entire, *Anno* 32 *Eliz.* of 3 Acres of Land, Parcel of the ſaid half yard Land, enfeoffed the ſaid *John Talbot*, to have and to hold to him and his Heirs: And afterwards, *Anno* 36 *Eliz.* of the ſaid 3 Acres of Paſture in which, *&c.* enfeoffed the ſaid *John Chapman* the Father, to have and to hold to him and his Heirs, who died thereof ſeiſed, and they deſcended to *John Chapman* the now Plaintiff, *&c.* Upon which the Avowant demur'd in Law. And the only Queſtion in this Caſe was, If the Lord had, by the Purchaſe of the ſaid 3 Acres of Paſture, in which, Parcel of the Tenements held of him by Heriot Service, extinguiſhed his Heriot or not. And the Avowant's Council did inſiſt ſtrongly upon the Words of *Littl. lib.* 2. *cap. ult. fol.* 49. where he ſaith, That notwithſtanding the Purchaſe of Parcel, *&c.* by the Lord, the (*a*) Homage and Fealty remain intire to the Lord; for the Lord ſhall have the Homage and Fealty of his Tenant for the Remnant of the Lands and Tenements held of him, as he had before, becauſe ſuch Services are not Annual Services, and can't be apportioned; which Reaſon proves (as it was urged) that the Heriot Service in the Caſe at Bar continues, for this Service is not Annual, being due only on the Death of the Tenant, and can't be apportioned becauſe it is entire; *ſcil. optimum Animal.* So they ſaid, That it appears by *Littleton*, *lib.* 2. *cap.* 3. & (*b*) 7 *E.* 3. 29. *a. b.* That he who holds by Knight's Service, ought to go in Perſon, or find another able Perſon for him, properly arrayed for the War, *&c.* which is an intire Service: And yet *Littleton* ſaith, *ubi ſupra*, *fol.* 49. That if the Lord Purchaſes Part of the Land ſo held (*c*) the Eſcuage ſhall be apportioned, which proves that the Tenure by Knight's Service remains for the Reſidue, and the Reaſon is, as it was urged, becauſe the entire Service was not Annual, and the Service by the Body of a Man can't be apportioned. Alſo they cited the Book in 34 *E.* 3. (*d*) *Heriot* 1. where it is held, That if my Tenant, who holds of me by a Heriot, aliens Parcel of his Land to another, each of them is chargeable to me of a Heriot, becauſe it is entire; and altho' the Tenant Purchaſes the Land again, *&c.* I ſhall have of him for each Portion a Heriot. So in the Caſe at Bar, altho' the Lord purchaſes Parcel

(*a*) Lit. Sect. 223. Co. Lit. 149. a. b. Lit. 49. a. 2 Brownl. 294, 295.

(*b*) Lit. Sect. 96. Lit. 20. a. 9 Co. 49. b. Co. Lit. 70. a.

(*c*) Lit. Sect. 223. Co. Lit. 149. b. Lit. 49. a.

(*d*) 6 Co. 1. a.

cel of the Land, yet he shall have a Heriot for the Residue, for it is entire, and not Annual. But it was answered and adjudged, *per totam Curiam*, That in the Case at Bar, the Heriot (a) Service was extinct. And first, the Resolutions in (b) *Bruerton*'s Case in the sixth Part of my *Reports* were affirmed to be good Law by the whole Court. And in this Case these Points were resolved. 1. That some entire Services by alienation of Parcel of the Tenancy shall be (c) multiplied, *scil.* that every several Alienee shall pay several entire Services; and some entire Services, by Alienation of Parcel shall not be multiplied, but the Lord shall be content with one amongst all the several Alienees: And as to that, it must be known, that there are four manner of entire Services: 1. When a Thing entire, be it a Chattel valuable, or a Thing of Pleasure, shall be rendred and paid by the Tenant to the Lord, a Chattel valuable, as an Horse, an Ox, gilt Spurrs, a Bow or Arrows, a Sword, a Gauntlet, or such like; Things of Pleasure, as a Faulcon, or other Bird, a Dog, or such Things of Pleasure: All such entire Services by Alienation of Parcel of the Tenancy shall be multiplied, and every Alienee shall render the entire Service: And yet by the Purchase of Parcel by the Lord the whole is (d) extinct, as it is resolved in the said Case of *Bruerton*. The 2. is a personal Service to be done by the Tenant to the Person of the Lord, as Homage, Fealty, Knights Service, to be (e) Carver, Sewer, Butler, or such personal Services to the Lord, and some of these shall multiply, and some not; and therefore Homage and Fealty by Alienation of Parcel shall multiply, because when the Tenant doth Homage or Fealty, he doth them for all the Tenements which he holds of the Lord, so that these Services extend to the entire Tenancy, and every Parcel of it, and altho' the Lord purchases Part, yet the Homage and Fealty remain for the Residue: So that altho' *Littleton*, *ubi supra*, holds, That the Homage and Fealty by purchase of Parcel shall not be extinct, but shall remain for the Residue, because such Services are not Annual, and can't be apportioned, that is (f) *ratio una, sed non unica*, as appears before. So Knights Service, which is an entire Service to be performed by the Body of a Man, shall be also multiplied by the Alienation of Parcel; and although the Lord purchases Parcel, the Knights Service shall not be extinct, but shall remain for the Residue, *quia* (g) *pro bono publico & pro Defensione Regni*, and the Escuage shall be apportioned. But the personal Service of Sewer, Carver, Butler, &c. or when the Tenant is bound by his Tenure *ad convivandum Dom' suum & familiam suam semel in anno, & ad equitandum*

(a) Co. Lit. 149. b.
(b) 6 Co. 1. 2.
(c) Co. Lit. 149. 2.
(d) 6 Co. 1. b. Moor 203. Co. Lit. 149. a.
(e) 6 Co. 2. a.
(f) Co. Lit. 149. 2.
(g) Co. Lit. 149. 2. b. 6 Co. 2. a.

equitandum cum Domino suo in Com' N. sumptibus suis propriis, &c. (*vide* 10 *E.* 3. 23. in *John de Brompton*'s Case) by Alienation of Parcel shall not be apportioned nor multiplied: For such Services which are for the private Benefit of the Lord, and are personal to be done by a Man, shall not be multiplied, because they are to be personally done by one Man only, and Multiplication of them wou'd be a Prejudice, and chargeable to the Tenant, and the Purchase of Parcel of the Tenancy by the Lord will extinguish all such personal private Service. The 3. is, When the Tenant is to exercise a personal Office, as to be Steward of the Court of the Manor, or Baily of the Manor, or Collector of the Rents of the Manor, or Woodward of the Manor, or the like Offices, they, by Alienation of Parcel of the Tenancy, shall not be multiplied, but the Lord may distrain each of them in these Cases to do it, but one only shall exercise it: And if the Lord purchase any Part of the Tenancy, the whole Service is extinct. The 4. is, When the Tenant by his Tenure is to do manual Labour, or Work touching Houses, Lands or Tenements; as to cover or repair the (*a*) Hall of the Lord's House, or to make or repair his Park Pale, or to plough or sow the Lord's Demeans, *&c.* or to reap his Corn, or to cut his Grass, or *molere blada sua*, or such like; these or other Services by Alienation of Parcel shall not be multiplied; for these Works are to be done on a certain Thing, which can't be multiplied.

(*a*) 6 Co. 2. a.

2. It was resolved, That there is no difference betw. intire annual Services, be they Valuable, or Things of Pleasure, and which shall be multiplied, as aforesaid, and between such entire Services not Annual: As if Lord and Tenant be to render a Horse every three, four or five Years, or upon Alienation, or Death; in these and the like Cases, if the Lord purchases Parcel of the Tenancy, such entire Services, not Annual, shall be as well extinct as the like annual Services.

3. It was resolved, That if *John Barny* had first enfeoffed *John Chapman* the Father, of the said three Acres of Pasture, and afterwards had enfeoffed the Lord of the said three Acres of Land, that notwithstanding the Heriot Service had remained for the Land which *John Chapman* the Father held; and the Reason is, because *John Chapman*, by his Purchase of three Acres, held by one several and distinct Tenure of Heriot Service, and therefore the Purchase of the Lord of any Part of the Residue which *John Barny* held, would extinguish only the Heriot which he ought to render, and not the Heriot which *John Chapman*, by reason of his distinct and separate Tenure ought to pay.

4. There is a diffe. betw. Heriot Service, and Heriot (*b*) Cust. as

(*b*) Co. Lit. 149. b. 2 Brownl. 296.

as to the Extinguiſhment thereof, when the Lord purchaſes Parcel of the Tenancy: For if the Lord purchaſes Parcel of the Tenancy, the Heriot Service is extinct: But if the Cuſtom of the Manor be, That upon the Death of every Tenant of the Manor, who dies ſeiſed of any Lands held of the ſame Manor, the Lord ſhall have a Heriot; although the Lord purchaſes Part of a Tenancy, yet the Lord ſhall have a Heriot by the (*a*) Cuſtom of the Manor for the Reſidue, for he remains Tenant to the Lord, and the Cuſtom extends to every Tenant: *Vide* Reader, the Books cited in the ſaid Caſe of *Bruerton*, by which theſe Differences, with the Reaſon of them appear.

(*a*) Co. Lit. 149. b. 2 Brownl. 296.

De termino ſancti Michaelis anno regni domini Jacobi nunc Regis Angliæ &c. ſexto.

HENRICUS Atkins de London in medicinis Doctor, Georgius Turner de London in medicinis Doctor, Thomas Moundeford de London in medicinis Doctor, Johannes Argent de London in medicinis Doctor, Johannes Taylor de London Yeoman, & Willihelmus Bowden de London Yeoman; attachiat' fuerunt ad reſpondend' Thomæ Bonham de London in Philoſophia & medicinis doctori, de placito quare ipſi ſimul cum Willihelmo Dun de London in medicinis doctore & Richardo Ware de London pellipario vi & armis ipſum Thomam Bonham apud London ceperunt, impriſonaverunt, & male tractaverunt, & ipſum ſic in priſona contra legem & conſuetudinem hujus regni Angliæ diu detinuerunt, Et alia enormia ei intulerunt ad grave damnum ipſius Thomæ Bonham, & contra pacem domini Regis nunc &c. Et unde idem Thomas Bonham per Richardum Cooke attornatum ſuum queritur, quod prædicti Henricus, Georgius, Thomas Moundeford, Johannes Argent, Johannes Taylor, & Willihelmus Bowden ſimul &c. decimo die Novembris, anno regni dicti Domini Regis nunc quarto, vi & armis ipſum Thomam Bonham apud London in Parochia beatæ Mariæ de Arcubus in warda de Cheape ceperunt, impriſonaverunt, & male tractaverunt, & ipſum ibidem ſic in priſona diu, videlicet, per ſpatium ſeptem dierum, contra legem & conſuetudinem hujus regni Angl' detinuerunt, & alia enormia &c. ad grave damnum &c. Et contra pacem &c. unde dicit quod deterioratus eſt & damnum habet ad valentiam treſcentarum librarum, & inde producit ſectam &c.

Et prædicti Henricus, Georgius, Thomas Moundeford, Johannes Argent, Johannes Taylor, & Willihelmus Bowden, per Franciſcum Barker attornatum ſuum, venerunt & defend' vim & injuriam quando &c. & quoad venire vi & armis dicunt, quod ipſi in nullo ſunt inde culpabiles, Et de hoc ponunt ſe ſuper patriam, Et prædictus Thomas Bonham ſimiliter. Et, quoad reſid' tranſgreſſionis & impriſonament' prædictorum ſuperius fieri ſuppoſit', iidem Henricus, Georgius, Thomas Moundeford, Johannes Argent, Johannes Taylor, & Willihelmus Bowden dicunt, quod prædict' Thomas Bonham actionem ſuam prædictam verſus eos habere non debet, quia dic', quod ante prædictum tempus quo ſupponitur tranſgr' & impriſonamentum prædict' fieri, dominus Henricus nuper Rex Angliæ octavus, viceſimo tertio die Septembris, anno regni ſui 10 per literas ſuas patentes quas iidem Henricus, Georgius, Thomas Moundeford, Johannes Argent, Johannes Taylor, & Willihelmus Bowden, magno ſigillo ſuo Angliæ ſigillat', gerent' dat' apud Weſtmonaſter' eiſdem die & anno, hic in Curia proferunt, recitando: Cum regii officii ſui munus arbitrabatur ditionis hominum felicitati omni ratione conſulere, id autem yel imprimis fore ſi improborum conatibus tempeſtive occurreret, apprime neceſſarium duxit improborum quoque hominum, qui medicinam magis avaritiæ ſuæ cauſa quam ullius bonæ conſcientiæ fiducia profitebuntur, unde rudi & credulæ plebi plurima incommoda oriantur, audaciam compeſcere: Itaque partim bene inſtitutarum civitatum in Italia & aliis multis nationib' exempl' imitati, partim gravium virorum Doctorum Johannis Chambre, Thomæ Linacre, Ferdinandi de Victoria, medicorum ſuorum, Nicholai Halſwell, Johannis Franciſci, & Roberti Yaxley medicorum, ac præcipue Reverendiſſimi in Chriſto patris ac dom' Dom' Thomæ tituli ſanctæ Ciciliæ trans Tiberim Rom' ſacroſanctæ eccleſiæ præſbyteri Cardinalis Eboracenſis Archiepiſc', & reg' ſui Angl' Cancell' chariſſi' precibus inclinat', collegiu' perpetu' Doctor' & gravium virorum qui medicinam in urbe ſua Lond' & ſuburb', intraque ſeptem millia paſſuum ab ea urbe quaquavers', publice exercerent, inſtitui voluit & imperavit; quibus tum ſui honoris, tum publicæ utilitatis nomine, curæ, ut ſperavit, eſſet, malitioſorum quorum meminerit inſcitiam temeritatemque, tam exemplo gravitateque ſua deterrere, quam per leges ſuas dudum editas, ac per conſtitutiones per idem collegium condendas punire, quæ quo facilius rite peragi potuiſſent, memoratis Doctoribus Johanni Chambre, Thomæ Linacre, Ferdinando de Victoria, medicis ſuis, Nich' Halſwell, Johanni Franciſco & Roberto Yaxley medicis, conceſſit, quod ipſi omneſque homines ejuſd' facultatis, de & in civitate præd' eſſent in re & nomine unum corpus & commu' perpetua ſive

collegium

collegium perpetuum, & quod eadem communitas ſive collegium ſingulis annis in perpetuum eligere poſſent & facere de communitate illa aliquem providum virum & in facultate medicinæ expertum in præſidentem illius collegii ſive communitatis, ad ſupervidendum, recognoſcendum, & gubernandum, pro illo anno, collegium ſive communitatem prædictam, & omnes homines ejuſdem facultatis, & negotia eorundem. Et quod idem præſidens & collegium ſive communitas haberent ſucceſſionem perpetuam, & commune ſigillum negotiis prædict' communitatis & præſidentis in perpetuum ſerviturum: Et quod ipſi & ſucceſſores ſui in perpetuum eſſent perſonæ habiles & capaces ad perquirend' & poſſidend' in feodo & perpetuitate terras, tenement', redditus, & alias poſſeſſiones quaſcunque. Conceſſit etiam eis & ſucceſſoribus ſuis pro ſe & hæredibus ſuis, quod ipſi & ſucceſſores ſui potuiſſent perquirere ſibi & ſucceſſoribus ſuis, tam in dicta urbe quam extra, terras & tenementa quæcunque ad annuum valorem duodecem librarum non excedent', ſtatuto de alienatione ad manum mortuam non obſtant': Et quod ipſi per nomina præſidentis & collegii ſive communitat' facultatis medicinæ London placitare & implacitari potuiſſent coram quibuſcunque judicibus in curiis & actionibus quibuſcunque: Et quod prædictus præſidens & collegium ſive communitas, & eorum ſucceſſores, congregationes licitas & honeſtas de ſeipſis, ac ſtatuta & ordinationes pro ſalubri gubernatione, ſurperviſu, & correctione collegii ſeu communitatis præd', & omnium hominum eandem facultatem in dict' civitate ſeu per ſeptem milliaria in circuitu ejuſdem civitatis exercentium, ſecundum neceſſitatis exigentiam (quoties & quando opus fuerit) facere valeant licite & impune ſine impedimento dict' nuper Regis, hæredum vel ſucceſſorum ſuorum, Juſticiariorum, Eſcaetorum, vicecomitum, & aliorum ballivorum, vel miniſtrorum ſuorum, hæredum vel ſucceſſorum ſuorum quorumcunque: Conceſſit etiam eiſdem præſidenti collegio ſive communitati & ſucceſſoribus ſuis, quod nemo in dicta civitate aut per ſeptem milliaria in circuitu ejuſdem exerceat dictam facultatem niſi ad hoc per dictum præſidentem & communitatem, ſeu ſucceſſores eorum qui pro tempore fuerint admiſſus ſit per ejuſd' præſidentis & collegii literas ſigillo ſuo communi ſigillat', ſub pœna centum ſolidorum pro quolibet menſe, quo non admiſſus eandem facultatem exercuerit, dimidium inde domino Regi & hæred' ſuis, & dimid' dict' præſident' & collegio applicand': Præterea voluit & conceſſit pro ſe & ſucceſſor' ſuis (quantum in ſe fuit) quod per præſident' & collegium præd' communitatis pro tempore exiſtent' & eorum ſucceſſores imperpetu', quatuor ſingulis annis per ipſos eligerent' qui haberent ſuperviſum & ſcrutinium, correctione',

& gubernationem, omnium & ſingulorum dictæ civitatis medicorum, utentium facultat' medicinæ in eadem civitate, ac aliorum medicorum forinſecorum quorumcunque facultatem illam medicinæ aliquo modo frequentantium & utentium infra eandem civitatem & ſuburbia ejuſdem, ſive infra ſeptem milliaria in circuitu ejuſdem civitatis, ac punitionem eorundem pro delictis ſuis in non bene exequend', faciend', & utend' illa: Necnon ſuperviſum & ſcrutinium omnium medicinarum & earum receptionem per dictos medicos ſeu aliquem eorum hujuſmodi ligeis dicti nuper Regis pro eorum infirmitatibus curand' & ſanand', dand', imponend', & utend', quoties & quando opus fuerit, pro commodo & utilitat' eorundem ligeorum dicti nuper Regis: Ita quod punitio eorundem medicorum utentium dicta facultate medicinæ ſic in præmiſſis delinquentium per fines, amerciamenta, & impriſonament' corporum ſuorum, & per alias vias rationabiles & congruas exequeretur: Voluit etiam & conceſſit pro ſe hæredibus & ſucceſſoribus ſuis, quantum in ſe fuit, quod nec præſidens nec aliquis de collegio prædict' medicorum, nec ſucceſſores ſui, nec eorum aliquis, exercens facultatem illam quoquomodo in futur', infra civitatem prædictam & ſuburbia ejuſdem ſeu alibi, ſummoneretur aut poneretur, neque eorum aliquis ſummoneretur aut poneretur in aliquibus Aſſiſis, Juratis, inqueſtis, inquiſitionib', attinctis, & aliis recognitionibus infra dictam civitatem & ſuburbia ejuſdem in poſterum coram Majore vel vicecomit' ſeu coronatoribus dictæ civitatis pro tempore exiſtent' capiend', aut per aliquem officiarium ſeu miniſtrum, vel officiarios ſive miniſtros ſuos, licet iidem Juratæ, inquiſitiones, ſeu recognitiones ſummonit' fuerunt ſuper breve vel brevibus dicti nuper Regis, vel hæred' ſuorum de rec', ſed quod dicti magiſtri ſive gubernatores ac communitas facultat' prædict' & ſucceſſores ſui & eorum quilibet, dictam facultatem exercens verſus eundem nuper Regem hæredes & ſucceſſores ſuos, ac verſus Majorem & vic' civitatis prædict' pro tempore exiſtent', & quoſcunque officiarios & miniſtros ſuos, forent inde quieti & exonerarentur in perpetuum, prout per eaſdem literas patentes inter alia plenius apparet. Et iidem Henricus, Georgius, Thomas Moundeford, Johannes Argent, Johannes Taylor, & Willihelmus, ulterius dicunt, quod virtute literarum patentium prædictarum prædicti Johannes Chambre, Thomas Linacre, Ferdinand de Victoria, Nicholaus Halſwell, Johannes Franciſcus, & Robertus Yaxley, medici, & omnes homines ejuſdem facultatis in civitate prædicta fuerunt unum corpus & communitas perpetua ſive collegium perpetuum. Poſteaq; per quendam Actum in Parliamento dicti nuper Regis Henrici octavi tent' apud London quinto decimo die April' anno Regni ſui quarto decimo, & abinde adjournat' uſque

Weſtmon'

Westmon' in com' Middlesex ult' die Julii anno regni ejusd' nuper Regis quinto decimo, & ibidem tunc tent', inter alia inactitat' fuit authoritate ejusd' Parliamenti, quod pro eo quod confectio prædict' corporationis medicor' fuit meritoria & valde bona pro repub' hui' regni Angl', & præterea expediens & necessarium fuit providere, quod nulla persona prædicti corporis politici & communitatis prædict' permitteretur exercere & practizare medicinam, Anglice **to practice Physick**, sed tantummodo tales personæ quæ essent profundæ & modestæ, Anglice **sad and discreet**, profunde literat' & maxime studiosæ in arte medicinæ, Anglice **groundly learned and deeply studied in Physick**: In consideratione cui', & pro ulteriori authoritat' prædictar' literarum paten', ac etiam pro amplificatione & elargiam'to ulterior' articulorum pro prædicta repub' habend' & fiend', per dictum nuper regem cum consensu dominor' spiritualium & temporalium & communit' in eod' Parliamento assemblat' inactitat' existit, inter alia, quod prædicta corporatio prædict' communitat' sodalitat' facultatis artis medicinæ præd', & omnis & quælibet concessio, articulus, & alia res, content' & specificat' in prædictis literis patent', approbarentur, concederentur, ratificarentur, & confirmarentur, in prædicto actu, & clare authorisarentur & admitterentur per eundem, bona, legal', & valid' Anglice **abailable**, prædicto corpori corporat' & suis successor' in perpetuum, in tam amplo & largo modo prout poterit acceptari, cogitari, & constitui per easdem literas patentes: Et ulterius inactitat', ordinat', & stabilit' existit per dictum actum, quod prædictæ sex personæ in prædict' literis paten' nominat' ut principales & primæ nominat' de prædict' communitat' & sodalitate eligerent eisdem duos alios ejusdem communitatis, qui extunc imposterum vocarentur & nominarentur electi: Et quod prædict' electi annuatim eligerent unum eorundem fore præsident' præd' communitatis, ac quoties aliqui loci prædictorum elect' contingerent fore vacui per mortem aut aliter, tunc superius prædict' elect', infra trigint' vel quadraginta dies proxim' post mortem eorundem, aut alicujus eorum, eligerent nominarent & admitterent unum vel plures, prout necessitas requireret, de maxime eruditis & expertis hominib' de & in præd' facultate in London supplere, Anglice **to supply**, locum & numerum octo personarum, ita quod ipse vel ipsi qui sic eligeretur pri' examinaretur stricte per prædictos supervisores secundum formam devisatam per prædict' elect', ac etiam per prædictos supervisores approbarentur, prout per eundem actum, inter alia, plenius apparet. Et iidem Henricus, Georgius, Thomas Moundeford, Johan' Argent, Johan' Taylor, & Willihelmus, ulterius dicunt, quod postea & ante præd' tempus quo &c. per quend' alium actum in Parliamento dominæ *Mariæ* nuper Reginæ Angliæ, vicesimo quarto die Octobris anno regni sui primo,

primo, apud Weſtm' prædict', recitando qd' cum in Parliam' tent' apud London quinto decimo die Aprilis, an. Regni domini H. nuper Reg' Angliæ octavi quarto decimo, & ab inde adjournat' uſque Weſtm' ultimo die Junii ann' Regni ejuſdem regis quinto decimo, & ibidem tent', inactitat' fuit, quod quædam conceſſio per literas paten' de incorporatione fact' & conceſſ. per prædict' nuper Regem medicis London & omnes clauſulæ & articuli content' in ead' conceſſione approbarent', concederentur, ratificarentur, & confirmarentur per præd' Parliament', in conſideratione cujus inactitat' fuit authoritat' ejuſd' Parliam', quod prædict' ſtatut' & act' Parliam' in omnib' articulis & clauſulis in eod' content', extunc imposterum ſtarent & continuarent in pleno robore, vi & effect', aliquo ſtatut', lege, conſuetudin', aut aliqua re fact', habit', vel uſitat' in contrarium in aliquo non obſtante. Et pro meliori reformatione diverſorum enormium contingent' reipublicæ per malum uſum & indebitam adminiſtrationem medicinarum, Anglice **Phyſick**, & pro amplificatione & elargatione, Anglice **the inlarging**, ultimorum articulorum, pro meliori executione rerum in prædict' conceſſione contentarum, ulterius inactitat' fuit, quod quandocunque præſidens Collegii aut communitas facultat' medicin' London pro tempore exiſten', vel tales quos prædictus præſidens & Collegium annuatim ſecundum tenorem & intentionem ejuſdem actus authoriſarent ſcrutare, examinare, corrigere, & punire omnes offenſores & tranſgreſſores in prædicta facultate infra prædict' civitat', & præcinct' in præd' act' expreſſ. mitterent vel committerent talem offenſorem vel offenſores, pro ejus vel eorum offenſ. vel inobedientia, Anglice **diſobedience**, contra aliquem articulum vel clauſulam content' in præd' conceſſ. vel act', alicui Gardo, Anglice **to any Ward**, Gaol', vel Priſonæ infra prædict' civitat' & præcinct' prædict' (Turre London excepta) quod tunc & de tempore in tempus Gardiani, Gaolatores, & Cuſtodes gard', gaolæ, & priſonarum infra civitat' aut præcinct' prædict' (except' præexcept') reciperent in ejus vel eorum priſonas omnes & quemlibet talem perſonam & perſonas ſic offendent' quæ ſic mitterentur vel committerentur eo vel eis, ut præfertur; & ibidem ſalvo cuſtodirent perſonam vel perſonas ſic commiſſ. in aliquam eorum priſonam, ad propria cuſtagia & onera prædict' perſonæ vel perſonarum ſic commiſſ. ſine ballio vel manucaptione, quouſque talis offenſor & offenſores vel inobedientes, Anglice **Diſobedients**, exonerarentur de prædict' impriſonament' per prædict' præſident' & tales perſonas qui per prædictum Collegium authoriſarentur, ſub pœna quod quilibet talis gardianus, gaolator, vel cuſtos, in contrarium faciens, perderet & forisfaceret duplicem talis finis & amerciamenti, qual' talis offenſor, offenſores aut inobedientes aſſeſſarentur ſolvere per tales

qual'

qual' præd' præſidens & Collegium authoriſarentur ut præfe-
tur: Ita quod iidem finis & amerciament' non eſſet ad aliquod
tempus ultra ſummam viginti librarum, medietas quarum ap-
plicaretur, Anglice **to be imployed**, ad uſum dictæ nuper Re-
ginæ hæredum & ſucceſſorum ſuorum, & altera medietas præ-
dict' præſident' & Collegio: quæ omnia forisfact' recuperen-
tur per actionem debit', billam, querelam, vel informatio-
nem, in aliquibus dict' nuper Regin' hæredum & ſucceſſor'
ſuorum cur' de record' vers' aliquem talem gardianum, gaola-
torem, aut ſervatorem ſic delinquent', in qua ſect' null' eſ-
ſon', legis vadiacio, vel protectio allocaretur, nec admitte-
tur pro defendent'. Et ulterius inactitat' fuit authoritate e-
juſdem Parliamenti, quod omnes Juſticiarii, Majores, vice-
com', ballivi, conſtabularii, & alii miniſtri, & officiarii infr'
civitat' & præcinct' prædict', ſuper requiſitionem eis fiendam,
adjuvarent, auxiliarent, & aſſiſterent præſident' prædicti Col-
legii & omnes perſonas per eos de tempore in tempus autho-
riſat', pro debit' executione prædicti actus vel ſtatuti, ſub pœ-
na pro non dand' auxilium currere in contempt' dictæ nuper
Reginæ hæred' vel ſucceſſor' ſuor', prout per eundem actum
inter alia plenius apparet. Et iidem Henricus, Georgius,
Thomas Moundeford, Johannes Argent, Johannes Taylor, &
Willihelmus, ulterius dicunt, quod virtute literarum paten'
prædictarum ac vigore ſtatutorum prædictorum, quidam Tho-
mas Langton in medicinis Doctor, vir providus & in facul-
tate medicinæ expertus, & adtunc unus de communitate Col-
legii medicorum in London prædict', & unus adtunc octo e-
lector' Collegii prædicti adtunc exiſtent', ante prædict' tempus
quo &c. ſcil' triceſimo die Septembris anno domini Mille-
ſimo Sexcenteſimo quinto, apud Collegium medicor' ſcituat'
in London in Parocia ſanctæ Benedictæ Paules Wharfe in
Ward' de Baynards Caſtle, præſidens Collegii præd' debit' e-
lect' & præfect' fuit in Officium præſident' Collegii prædicti,
& officio præſident' Collegii prædict' adtunc & ibidem fun-
gebatur: ipſoque Thom. Langton præſident' Collegii præ-
dict' exiſtent', iidem præſidens & communitas Collegii præ-
dicti, eodem triceſimo die Septembris an' domini Milleſimo
ſexcenteſimo quinto ſupradict', apud Collegium prædict', ele-
gerunt Radulphum Wilkenſon, Willihelmus Dun, Rich.
Palmer, & Johannem Argent, viros providos & in facultate
medicinæ expert' & adtunc quatuor de Collegio prædicto
exiſten' doctores, fore quatuor cenſores ſive gubernatores
communitatis prædict' ad ſupervidend' & ſcrutand' corrigen-
dum & gubernandum omnes & ſingulos dictæ civitatis me-
dicos utentes facultate medicinæ in eadem civitat', ac alios
medicos forincecos quoſcunque facultatem illam medicinæ
aliquo modo frequentant' & utent' infra eandem civitatem
& ſuburbia ejuſdem, ſive infra ſeptem milliaria in circuitu

ejuſdem

ejuſdem civitatis, ac ad puniendum eorum delicta in non bene exequendo, faciendo, & utendo illa, Nec non ſupervidend' & ſcrutand' omnimodas medicinas, & earum receptiones per dict' medicos ſeu aliquem eorundem pro infirmitatibus curand', quoties opus fuerit, & ad puniend' eoſdem medicos utentes dicta facultate medicinæ in præmiſſis delinquentes per fines, amerciamenta, & impriſonamenta corporum ſuorum, & alias vias rationabiles & congruas, ſecundum formam & effect' literarum patentium prædictar' & ſtatutorum prædictor': Ipſoque Thomas Langton præſidente Collegii prædict' exiſten', ac prædict' Radulpho Wilkenſon, Willihelmo Dun, Rich. Palmer, & Johanne Argent, quatuor cenſoribus ſive gubernatoribus Collegii præd' ſimiliter exiſten', prædictus Tho. Bonham infra præd' tempus quo &c. ſcil. decimo die Aprilis an. domini Milleſimo ſexcenteſimo ſexto infra London prædict' in prædict' Parochia beatæ Mariæ de Arcubus in Ward' de Cheape prædict', contra formam & effect' literarum paten' prædict' & prædict' ſtatutorum fact' in prædict' parliamento prædicti Regis Henrici octavi, exercebat artem medicinæ, Anglice **did practice Phyſick**, non admiſſus per literas prædict' præſident' & Collegii ſigillo eorum communi ſigillat', ubi revera prædictus Tho. Bonham fuit minus ſufficiens ad artem medicinæ exercend', Anglice **was inſufficient to practice Phyſick**, ratione cujus prædictus Thomas Bonham poſtea, ſcil. tertiodecimo die Aprilis an. domini Milleſimo ſexcenteſimo ſexto, apud London in parochia & Ward' prædict', ſumm' fuit per prædictos cenſores ſive gubernatores Collegii prædict' ad comparend' coram præſidente & cenſoribus ſive gubernatoribus Collegii prædicti apud Collegium præd', in parochia & Ward' præd', quarto decimo die Aprilis an. domini Milleſimo ſexcenteſimo ſexto ſupradict' tunc proxim' ſequen' ſuper præmiſ. examinand'; ad quem quid' quartum decimum diem April' an. dom' Milleſimo ſexcenteſimo ſexto ſuprad' apud Collegium præd' venit præd' Thomas Bonham in propria perſona ſua coram præfat' præſident' & cenſoribus ſive gubernatoribus prædictis, & adtunc & ibidem examinatus fuit de ſcientia ſua in facultate ſua in medicinis adminiſtrand' per prædictos cenſores ſive gubernatores Collegii prædicti, & quia prædictus Thomas Bonham ſic examinatus minus apte & inſufficienter in prædicta arte medicinæ reſpondebat, adtunc & ibidem ſuper examinationem prædict' invent' fuit per prædict' præſident' & cenſores ſive gubernatores Collegii prædict' min' ſufficiens & inexpert' ad artem medicinæ adminiſtrand', ac pro eo quod prædictus Thomas Bonham multocies examinat' & interdict' per præſident' & cenſores ſive gubernatores prædict' exiſten' ex cauſis prædictis ad artem medicinæ adminiſtrand', per unum menſem & amplius poſt talem interdictionem facultatem illam infra London

prædict'

prædict' in præd' parochia beatæ Mariæ de arcubus in Ward' de Cheape præd' ſine licentia prædictor' præſident' & Collegii ſub eorum communi ſigillo, contra formam literarum patentium & Statut' prædict', exercebat, adtunc & ibidem conſ. fuit per prædictos Præſidentem & cenſores ſive gubernatores Collegii prædicti, quod prædict' Thomas Bonham pro inobedientia & contemptu ſuis prædict' amerciaretur ad centum ſolidos in proximis comitiis prædictorum præſidentis & Collegii apud Collegium prædictum perſolvendos: Et adtunc & ibid. conſ. & mandatum fuit eidem Thomæ Bonham per eoſdem præſident' & cenſores ſive gubernatores Collegii prædicti, quod prædict' Thomas Bonham deinceps abſtineret a praxi, Anglice **practiſing Phyſick**, infra prædict' civitat' London & ſuburbia inde & ſeptem milliaria in circuitu ejuſdem civitatis quouſque prædict' Tho. Bonham inventus foret ſufficiens & admiſſus foret ad practizand' prædictam artem medicinæ infra civitatem & circuitum prædict' per præſidentem & Collegium præd', ſub pœna conjiciend' in carcerem, ſi in præmiſſis, ut prædictum eſt, delinquerit. Et iidem Henricus, Georgius, Thom. Moundeford, Johannes Argent, Johannes Taylor, & Willihelmus Bowden, ulterius dic', qd' poſtea & ante prædict' tempus quo &c. ſcil. primo die Octobris an. domini Milleſimo ſexcenteſimo ſexto ſupradicto, apud Collegium prædict' in London prædict' in parochia & Ward' prædict' prædictus Thomas Langton in medicin' doctor vir providus & in facultate medicinæ expertus, & adtunc unus de communitate Collegii medicorum in London prædict' & unus adtunc elect' Collegii præd' adtunc exiſten', apud Collegium prædict' elect' & præfect' fuit in officium præſidentis Collegii præd' pro uno anno tunc proxim' ſequen', & officio præſidentis Collegii præd' adtunc & ibidem fungebatur. Ipſoque Thom. Langton præſiden' Collegii præd' exiſten' iidem præſidens & Communitas Collegii præd' eod' primo die Octob. an. domini Milleſimo ſexcenteſimo ſexto ſuprad' apud Collegium præd' eligerunt præd' Georgium Turner, Tho. Moundeford, Will' Dun, & Johan' Argent doctores, viros providos & in facultate medinæ expertos & adtunc quatuor de Collegio præd' exiſten', fore quatuor cenſores ſive gubernatores Collegii præd' ad ſupervidend' & ſcrutand' corrigend' & gubernand' omnes & ſingulos dict' civitatis medicos utentes facultate medicin' in ead' civitat' ac alios medicos forinſecos quoſcunque facultat' illam medicin' aliquo modo frequentant' & utent' infra eandem civitat' & ſuburbia ejuſd' civitatis ſive infra ſeptem milliaria in circuitu ejuſd' civitatis, ac puniend' eorum delicta in non bene exequendo faciendo & utendo illa, nec non ſupervidend' & ſcrutandum omnimodas medicinas & receptiones per dictos medicos exercen' præd' facultat' medicinæ infra civitat' London præd' & circuit'

præd'

præd', ſeu aliquem eorundem, pro infirmitatibus curandis, quoties opus fuerit, adminiſtrand', ac ad puniend' eoſdem medicos utent' dicta facultate medicinæ in præmiſſ. delinquent' per fines, amerciamenta, & impriſonament' corporum ſuorum & alias vias rationabiles & congruas ſecundum form' & effect' literarum patent' & ſtatut' præd': Ipſoq; Thoma Langton præſident' Collegii prædict' exiſten', ac prædict' Georgio Turner, Thoma Moundeford, Willihel' Dun, & Johanne Argent, quatuor cenſoribus ſive gubernatoribus Collegii prædict' ſimiliter exiſten', præd' Tho. Bonham ante prædict' tempus quo &c. ſcil. viceſimo die Octobris an. domini Milleſimo ſexenteſimo ſexto ſupradicto infra London prædict' viz. in præd' parochia beat' Mariæ de arcub' in Ward' de Cheap prædict' exercebat artem medicinæ, Anglice did practiſe Phyſick, contra formam prædictarum literarum paten' & prædict' ſtatut' & prædict' interdictionem & mandat' prædictorum præſident' & cenſorum: poſteaque, ſcil. eodem viceſimo die Octobris an. domini Milleſimo ſexenteſimo ſexto ſupradict', prædict' Thomas Bonham apud London in prædicta parochia beatæ Mariæ de arcubus in Ward' de Cheape prædict' ſummonit' fuit per præfat' cenſores ſive gubernatores Collegii prædicti ad comparend' coram præſident' & cenſoribus ſive gubernatorib' Collegii prædict' apud Collegium prædictum in parochia & Ward' prædict' viceſimo ſecundo die ejuſdem menſis Octobris ſuper præmiſſ. examinand', ad quem quidem viceſimum ſecundum diem Octobris an. domini Milleſimo ſexenteſimo ſexto ſupradicto, ad comitia Collegii prædicti tent' apud Collegium illud apud London prædict' in parochia & Ward' prædict', poſtea ſcil. eod' viceſimo ſecundo die Octobris anno domini Milleſimo ſexenteſimo ſexto ſupradicto coram prædictis Georgio Turner, Willihelmo Dun, Thoma Moundeford, & Johanne Argent, adtunc cenſoribus ſive gubernatoribus Collegii prædict', pro eo quod prædictus Thomas Bonham, per prædictos cenſores ſive guberuatores Collegii prædicti ut præfertur admonitus ad comparend' ad Collegium prædict' coram præſident' & cenſoribus ſive gubernatoribus Collegii prædict' ad prædict' viceſimum ſecundum diem Octobris eod' die non comparuit, adtunc & ibidem conſ. fuit per eoſdem cenſores ſive gubernatores Collegii prædicti, qd' præd' Thomas Bonham pro inobedientia & contemptibus ſuis amerciaretur ad decem libras, & quod prædict' Thomas Bonham ex cauſis prædict' arreſtaretur & in cuſtod' traderetur. Et iidem Henricus, Georgius, Thomas Moundeford, Johannes Argent, Johannes Taylor, & Willihelmus, ulterius dic', quod poſtea & ante præd' tempus quo &c. ſcil. viceſimo quarto die Octob' an. dom' Milleſimo ſexenteſimo ſexto ſupradicto, prædictus Thomas Langton præſidens Collegii præd' apud London in prædict' parochia beatæ Mariæ de arcubus

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in Ward' de Cheape prædict' obiit, poſt cujus mortem, & ante præd' tempus quo &c. ſcilicet, viceſimo quinto die Octobris Anno Domini milleſimo ſexenteſimo ſexto ſupradict', idem Henricus Atkins vir provid' & in facultate medicinæ expertus, & unus de communitate Collegii præd', & unus adtunc octo electorum Collegii præd', adtunc exiſten', apud Collegium præd' infra London præd' in parochia & ward' præd' debite elect' & præfect' fuit in officium præſidentis Collegii præd' pro uno anno integro tunc proxime ſequen', & officio præſident' præd' Collegii adtunc & adhuc fungebatur: Ipſoque Hen' Atkins præſident' Collegii præd' exiſten', ac præd' Georgio Turner, Willihelmo Dun, Thom' Moundeford, & Johanne Argent, cenſoribus ſive gubernatoribus Collegii prædict' exiſten', ad comitia Collegii præd' tenta apud Collegium prædict' infra London prædict' in parochia & ward' prædict' ſeptimo die Novembris Anno Domini Milleſimo ſexenteſimo ſexto ſupradicto coram præf' Hen' Atkins, adtunc præſident' Colleg' præd' & præd' Georg' Turner, Will' Dun, Tho' Moundeford, & Johann' Argent, adtunc cenſorib' ſive gubernatorib' Collegii præd', ven' præd' Tho' Bonham in propria perſona ſua; de quo quidem Tho' Bonham, cum præd' Henricus Atkins, adtunc præſidens Collegii, & prædict' Georg' Turner, Will' Dun, Tho' Moundeford, & Jo' Argent, adtunc cenſores ſive gubernatores Collegii præd' quærebant num vellet Collegio præd' ſatisfacere pro inobedientia & contemptibus ſuis præd' & iterum ſe examinand' ſubjicere & Collegii præd' cenſuræ parere, Et prædict' Tho' Bonham, adtunc & ibidem reſpondebat, ſe ante tunc infra London prædict' feciſſe & exercuiſſe, & extunc impoſterum infra London prædict' facere & exercere velle medicinam, nulla de Collegio prædicto petit' venia, neque ſe in ulla re præſident' & cenſoribus ſive gubernatoribus Collegii prædict' obtemperare velle, & adtunc & ibid' affirmans prædict' præſident' & cenſores ſive gubernatores prædict' nullam habere authoritat' in eos qui Academia doctores facti eſſent; per qd' iidem cenſores ſive gubernatores, pro offenſis & inobedientia præd', adtunc & ibid' ordinaverunt & decreverunt, qd' præd' Tho. Bonham in carcerem mandaretur ib' remanſurus quouſq; abinde per præſident' & cenſores ſive gubernatores Collegii præd' pro tempore exiſten' deliberaretur, prout per præd' literas paten' & ſtatut' ordinat' & ſtabilit' eſt; & adtunc & ibid' quoddam warrant' ſuum ſigillo communi Collegii ſive communitatis præd' ſigillat' & cuſtod' priſonæ dom' Regis in Computatorio Lond' in le Poultrie in parochia ſanctæ Mildredæ in Ward' de Cheape directum fecerunt, mand' per idem warran' præfat' cuſtodi priſonæ præd', qd' idem cuſtos priſonæ præd' reciperet corpus præd' Tho. Bonham, & eum in priſona dicti dom' Regis ibidem

ibidem ſalvo cuſtod' abſque ballio ſive manucaptione, ad ipſi' Tho. Bonham propria cuſtag' & onera donec prædictus Thomas Bonham, per præcept' eorundem præſident' & cenſorum ſive gubernatorum prædict' aut ſucceſſorum eorum, liberatus eſſet; quem quidem Tho. Bonham pro offenſis & inobedientiis ſuis prædict' una cum warrant' prædict' in forma prædict' fact' idem Henricus Atkins, adtunc præſidens Collegii prædicti exiſtens, & prædicti Georgius Turner, Willihelmus Dun, Tho. Moundeford, & Johannes Argent, adtunc quatuor cenſores ſive gubernatores Collegii prædicti exiſten', virtut' literarum paten' ac ſtatutorum prædictorum, ac prædicti Willihelmus Bowden & Johannes Taylor, ut ſervientes prædictorum Hen. Atkins, præſident', & Georgii, Willihelmi Dun, Thomæ Moundford, & Johannis Argent, & per ipſorum præſident' & quatuor cenſorum ſive gubernatorum prædictorum præcept' præd' tempore quo &c. cuidam Ric. Ware adtunc cuſtodi priſonæ dicti domini Regis computatorii prædict' apud London in prædicta parochia ſanct' Mildredæ virginis in Poultria in Ward' de Cheape prædict' commiſerunt & deliberaverunt ſalvo cuſtod' ſecund' formam & effect' literarum paten' & ſtatutorum præd', prout eis bene licuit, quæ quidem commiſſio prædict' Thomæ Bonham ex cauſis prædict' in form' prædict' fact' eſt ead' tranſgreſſio & impriſonamentum unde prædict' Tho. Bonham ſuperi' ſe modo queritur. Et hoc parati ſunt verificare, unde petunt judicium ſi præd' Thomas Bonham actionem ſuam prædict' verſus eos habere debeat &c.

Et prædictus Thomas Bonham dic', quod ipſe per aliqua præallegat' ab actione ſua prædicta habend' præcludi non debet, quia proteſtand' quod ipſe idem Thomas Bonham, non fuit min' ſufficiens, nec fuit inventus per prædictos præſidentes & cenſores ſive gubernatores Collegii prædicti minus ſufficiens ad artem medicin' exercend' vel adminiſtrand', Anglice to practice Phyſick, nec minus apte & inſufficient' præfat' præſident' & cenſoribus ſive gubernatoribus prædict' Collegii in prædicta arte medicinæ reſpondebat, prout præd' Henricus Atkins, Georgius Turner, Thomas Moundeford, Johannes Argent, Johannes Taylor, & Willihelm' Bowden, ſuperius allegaverunt, pro placito idem Thomas Bonham dic', quod per prædictum actum in prædicto Parliamento prædicti nuper Regis Henrici octavi tent' apud London prædict' quinto decimo die Aprilis anno regni ſui quarto decimo, & abinde adjournat' uſque Weſtm' in prædict' com' Middleſex uſque ultimum diem Julii an. regni ejuſdem Regis quinto decimo, & ibid' tunc tent' ulterius inactitat' fuit authoritate ejuſdem Parl' quod cum in dioceſ. Angl' extra Lond' tunc non fuit veriſimile invenire ſemper homines habiles ad ſufficient' examinand' ſecund' præd' ſtatut' tales qui admitterentur ad exercend' medi-

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cin' in eiſd', Nulla perſona impoſterum permitteretur exercere in medicin' per Angliam, Anglice **through England**, quouſq; eadem perſon' examinaretur apud London per prædict' præſident' & tres præd' elector', & haberet de præd' præſident' & elect' literas teſtimoniales de eorum approbatione & examinatione, niſi ipſe foret Graduatus, Anglice **a Graduate**, Oxoniæ vel Cantabridgiæ qui adimpleviſſet omnia, Anglice **had accomplished all Things**, pro forma ſua abſque aliqua gratia. Et ulterius idem Thomas Bonham dicit, quo ipſe idem Thomas ſecundo die Julii anno dom' Milleſimo, quingenteſimo nonageſimo quinto, in alma Academia Cantabr' præd', ſuſcepit gradum & dignitatem doctoris in medicinis, & adtunc & ibid', ſcilicet, eodem ſecundo die Julii anno domini Milleſimo quingenteſimo nonageſ. quinto ſuprad' in Academia prædict' apud Cantabridg' præd' in Com' Cantabr' rite & legitime ordinatus & factus fuit graduatus, Anglice **a Graduate**, Academiæ prædictæ, viz. doctor in medicin', ſecund' leges, ſtatuta, conſtitutiones, & ordinationes dictæ Academiæ Cantabr' præd', quodque ipſe idem Thomas Bonham adtunc & ibidem adimpleviſſet omnia, Anglice **had accomplished all Things**, concernen' gradum ſuum præd' pro forma ſua abſque gratia de tempore in tempus ſecund' leges, ſtatuta, conſtitutiones, & ordinationes dictæ Academiæ Cantabridg' prædict', quorum prætextu idem Tho. Bonham graduatus Academiæ Cantabr' præd', viz. Doct' in medicin' in forma prædict' exiſtens, qui adimpleviſſet omnia, Anglice **had accomplished all Things**, concernen' gradum ſuum præd' pro forma ſua abſq; aliqua gratia, dict' facultat' medicin' de tempore in tempus in dicta civitat' London, viz. in præd' parochia beatæ Mariæ de arcub' in Ward' de Cheape prædict' exercuit, prout ei bene licuit, quouſque prædict' Hen' Atkins, Georgius Turner, Tho. Moundeford, Johan' Argent, Joh' Taylor, & Willihel' Bowden ſimul &c. præd' decimo die Novembris an. quarto ſupradict' vi & armis ipſum Thom. Bonham, apud Lond' præd' in præd' parochia beatæ Mariæ de arcubus in Ward' de Cheape, ceperunt, impriſonaverunt, & ipſum ibid' ſic in priſona diu, videlicet, per ſpatium ſeptem dierum contra legem & conſ. hujuſ. regni Angl' detinuerunt, prout præd' Thomas Bonham ſuperius verſus eos queritur. Et hoc parat' eſt verificare, unde ex quo præd' Hen' Atkins, Georgius Turner, Tho. Moundeford, Johannes Argent, Johannes Taylor, & Willihel' Bowden, tranſgr' & impriſonamentum præd' ſuperius cogn', idem Thomas Bonham petit judicium & damna ſua ratione tranſgr' & impriſonamenti prædictorum ſibi adjudicari &c. Et præd' Hen' Atkins, Georgius Turner, Tho. Moundeford, Johan' Argent, Johan' Taylor, & Willihel' Bowden dic', qd' præd' placit' præd' Tho. Bonham ſuperius replicand' placitat' minus ſufficiens in lege exiſtit ad action' præd' Tho. Bonham præd' verſ. ipſos Hen.

Atkins, Georgius Turner, Thom. Moundeford, Johan' Argent, Johannes Taylor, & Willihelm' Bowden manutenend', quodq; ipſi ad placitum illud modo & forma præd' replicand' placitat' neceſſe non habent, nec per legem terræ tenentur reſpondere. Et hoc parati ſunt verificare, unde pet' judicium, & quod præd' Tho. Bonham ab actione ſua præd' vers' eos habend' præcludat' &c. Et præd' Tho. Bonham, ex quo ipſe ſufficient' materiam in lege ad actionem ſuam præd' verſus præd' Henricum, Georgium, Tho. Moundeford, Johan' Argent, Johannem Taylor, & Willihelmum Bowden, manutenend' ſuperi' allegavit, quam ipſe paratus eſt verificare, quam quidem materiam præd' Henricus, Georgius, Tho. Moundeford, Johannes Argent, Johannes Taylor, & Willihelmus Bowden non dedicunt, nec ad eam aliqualiter reſpond', ſed verificationem illam admittere omnino recuſant, ut pri' petit judicium & damna ſua occaſione tranſgreſſionis & impriſonamenti prædictor' ſibi adjudicari &c. Et quia Juſticiarii hic ſe adviſare volunt de & ſuper præmiſ. prædict' unde partes præd' poſuerunt ſe ad judicium curiæ præd' priuſquam judicium inde reddant, dies dat' eſt partib' præd' hic uſq; in Octabis ſancti Hillarii ad audiend' inde judicium ſuum, eo quo iidem Juſtic' hic inde nondum &c.

Hill.

Hill. 7 Jacobi *Regis*.

Dr. BONHAM's *Case*.

THOMAS Bonham, Dr. in Philosophy and Physick, brought an Action of false Imprisonment against *Henry Atkins*, *George Turner*, *Thomas Moundeford*, and *John Argent*, Drs. in Physick, and *John Taylor*, and *William Bowden* Yeomen; for that the Defendants, the 10 *Nov. Anno* 4 *Jacobi*, did imprison him, and detain him in Prison seven Days. The Defendants pleaded the Letters Patents of King *H.* 8. bearing Date 23 *Septemb. Anno* 10 of his Reign, by which he recites, (a) *Quod cum regii officii sui munus arbitrabatur ditionis suæ hominum fœlicitati omni ratione consulere, id autem vel imprimis fore si improborum conatibus tempestivo occurreret*, &c. And by the same Letters Patents, the King granted to *John Chambre*, *Thomas Linacre*, *Ferdinando de Victoria*, *John Halswel*, *John Frances*, and *Robert Yaxley*, *quod ipsi omnesque homines ejusdem facultatis de & in civitat'* London *sint in re & nomine unum corpus & communitas perpetua, per nomen Præsidentis & Collegii, sive communitatis facultatis medicinæ* London, *&c.* And that they might make Meetings and Ordinances, *&c.* But the Case at Bar doth principally consist on two Clauses in the Charter. The first, *Concessimus etiam eisdem Præsidenti & Collegio seu Communitati & successoribus suis, quod nemo in dicta Civitate, aut per septem milliaria in circuitu ejusdem, exerceat dictam facultatem Medicinæ, nisi ad hoc per dict' Præsident' & Communit' seu successores suos, qui pro tempore fuerint, admissus sit per ejusdem præsidentis & Collegii Literas sigillo suo communi sigillat' sub pœna cen-*

4 Inst. 251. 2 Brownl. 255, 256, &c.

(a) 2 Brownl. 256, 260.

tum ſolidorum pro quo libet menſe quo non admiſſus eandem facultatem exercuerit, dimid' inde Dom' Regi & hæredibus ſuis, & dimidium dict' Præſidenti & Collegio applicand' &c. The ſecond Clauſe is, which immediately follows in theſe Words, *Præterea voluit & conceſſit pro ſe & ſucceſſoribus ſuis, quantum in ſe fuit, quod per præſident' & Collegium Prædict' Communitat' pro tempore exiſt' & eorum ſucceſſores imperpetuum, quatuor ſingulis annis per ipſos eligerent' qui haberent ſuperviſum & ſcrutinium, correctionem & gubernationem omnium & ſingulorum dict' Civitatis Medicorum, utentium facultat' medicinæ in eadem Civitate, ac aliorum Medicorum forinſecorum quorumcunque facultatem illam Medicinæ aliquo modo frequentantium & utentium infra eandem Civitatem & ſuburbia ejuſdem, ſive infra ſeptem milliaria in circuitu ejuſdem Civitatis, ac punitionem eorundem pro delictis ſuis in non bene exequend' faciend' & uten' illa: necnon ſuperviſum & ſcrutinium omnium medicinarum, & earum receptionem per dictos Medicos ſeu aliquem eorum hujuſmodi legeis dicti nuper Regis pro eorum infirmitatibus curand' & ſanand' dand' imponend' & utend' quoties & quando opus fuerit, pro commodo & utilitat' eorundem ligeorum dicti nuper Regis: Ita quod punitio eorundem Medicorum utentium dicta facultate Medicinæ ſic in præmiſſ' delinquentium per fines, amerciamenta & impriſonament' corporum ſuorum, & per alias vias rationabiles & congruas exequeretur, prout* by the ſaid Charter *plenius liquet. Et quod virtute præd' literarum patentium præd' Johan' Chambre, Tho. Linacre, &c. & omnes Homines ejuſdem Facultatis in Civit' præd' fuer' unum Corpus & communitas perpet' ſive Collegium perpetuum.* And afterwards, by Act of Parliament made *An.* (*a*) 14 *H.* 8. It was enacted, That the ſaid Corporation, and every Grant, Article, and other Things in the ſaid Letters Patents contained and ſpecified, ſhould be approved, granted, ratified and confirmed, *&c. in tam amplo & largo modo prout poterit acceptari, cognitari, & conſtrui per eaſdem Literas Patentes.* And further it was enacted, That the ſaid ſix Perſons named in the ſaid Letters Patents, as Principal of the ſaid College, ſhould elect to them two others of the ſaid College, who ſhould be named *Electi*, and that the ſaid Elects ſhould chooſe one of them to be Preſident, as by the ſaid Act appears: And further, they pleaded the Act of (*b*) 1 *Mariæ*, by which it is enacted, *Quod quædam conceſſio per Literas Patentes de incorporatione facta per prædict' nuper Regem Medicis* London. *Et omnes clauſulæ & articuli content' in eadem conceſſione approbarentur, concederentur, ratificarentur & confirm' per prædict' Parliam'; in conſideratione cujus inactitat' fuit authoritate ejuſdem Parliamenti. Quod præd' ſtatut' & Actum Parliamenti in omnibus articulis & clauſulis in eodem content' extunc imposterum ſtarent & continuarent in pleno robore,* &c. And further it was enacted,

(*a*) 14 & 15 H. 8. cap. 5. 1 Roll. 598. 4 Inſt. 251. Raſtal's Phyſicians 3. 2 Bulſt. 185. Lit. Rep. 168, 169, 172, 212, 215, 246, 247, 248, 249. 1 Jones 261. Cr. Jac. 121, 159, 160. Cr. Car. 256. Palm. 486.

(*b*) 1 Mar. c. 9. Raſtal's Phyſicians 7. Lit. Rep. 169, 172, 173, 212, 213, 215, 248, 249, 350, 351. 1 Jones 263. Cr. Car. 257. Cr. Jac. 121. 4 Inſt. 251. 2 Brownl. 257, 262, 265, 266.

ed, *That whensoever the President of the College, or Commonalty of the Faculty of Physick of* London *for the Time being, or such as the said President and College shall yearly, according to the Tenor and Meaning of the said Act, authorize to search, examine, correct and punish all Offenders and Transgressors in the said Faculty,* &c. *shall send or commit any such Offender or Offenders for his or their Offence or Disobedience, contrary to any Article or Clause contained in the said Grant or Act, to any Ward, Gaol or Prison within the same City (the Tower of* London *except) that then from Time to Time the Warden, Gaoler or Keeper,* &c. *shall receive,* &c. *such Person so offending,* &c. *and the same shall keep at his proper Charge, without Bail or Mainprize, until such Time as such Offender or Disobedient be discharged of the said Imprisonment by the said President, and such Persons as shall be thereunto authorised, upon pain that all and every such Warden, Gaoler,* &c. *doing the contrary, shall lose and forfeit the double of such Fines and Amerciaments as such Offender and Offenders shall be assessed to pay, by such as the said President and College shall authorize as aforesaid, so that the Fine and Amerciament be not at any one Time above the Sum of* 20 l. *the one Moiety to the King, the other Moiety to the President and College,* &c. And further pleaded, That the said *Thomas Bonham*, 10 *April'* 1606, within *London*, against the Form of the said Letters Patents, and the said Acts, *exercebat artem Medicinæ non admissus per Literas prædict' Præsidentis & Collegii sigillo eorum communi sigillat' ubi revera prædict'* Tho. Bonham *fuit minus sufficiens ad artem Medicinæ exercend'*. By force of which, the said *Thomas Bonham* 30 *April'* 1606. was summoned in *London* by the Censors or Governors of the College, *ad comparend' coram præsident' & Censor' sive Gubernatorib' Collegii prædict'* at the College, &c. the 14 Day of *April* next following, *super præmissis examinand'*. At which Day the said *Thomas Bonham* came before the President and Censors, and was examined by the Censors *de scientia sua in facultate sua in Medicin' administrand'. Et quia prædict'* Thomas Bonham *sic examinatus minus apte & insufficienter in prædict' arte medicinæ respondebat, & inventus fuit super examinationem prædict' per prædict' Præsident' & Censores minus sufficiens & inexpert' ad artem Medicinæ administrand' ac pro eo quod prædict'* Tho. Bonham *multoties ante tunc examinatus, & interdictus per Præsident' & Censores, de causis prædict' ad artem medicinæ administrand' per unum mensem & amplius post talem interdictionem facultatem illam in* Lond' *prædict' sine licentia,* &c. *ideo adtunc & ibid' consideratum fuit per prædict' Præsident' & Censores, quod prædict'* Tho. Bonham *pro inobedientia & contempt' suis prædict' amerciaretur to* 100 s. *in proximis comitiis prædict' Præsident' & Collegii persolvend' & deinceps abstineret,* &c. *quousque inventus fuerit sufficiens,* &c. *sub pœna*

conjiciendi in Carcerem ſi in præmiſſis delinqueret. And that the ſaid *T. Bonham* 30 *Octo.* 1606. within *London* did practiſe Phyſick, and the ſame Day he was ſummoned by the Cenſors to appear before the Preſident and them, 22 *Octob.* then next following, at which Day *Bonham* made Default: *Ideo conſideratum fuit per præd' Cenſores*, that for his Diſobedience and Contempt he ſhould be amerced to 10 *l.* and that he ſhould be arreſted and committed to cuſtody; and afterw. 7 *Novemb.* 1606. the ſaid *T. Bonham*, at their Aſſembly came before the Preſident and Cenſors, and they aſked him if he would ſatisfy the College for his Diſobedience and Contempt, and ſubmit himſ. to be examined, and obey the Cenſure of the College, who anſwered, That he had practiſed and would practiſe Phyſick within *London nulla a Collegio petita venia*, and that he would not ſubmit himſ. to the Preſident and Cenſors, and affirmed, that the Preſident and Cenſors had no Authority over thoſe who were Doctors in the Univerſity; for which Cauſe, the ſaid 4 Cenſors, *ſc.* Dr. *Turner*, Dr. *Moundford*, Dr. *Argent*, and Dr. *Dun*, then being Cenſors, or Governors, *pro offenſis & inobedientia præd' adtunc & ib' ordinaverunt & decreverunt, qd' præd'* T. Bonham *in carcerem mandaretur ib' remanſur' quouſque abinde per Præſident' & cenſores, ſeu gubernatores Collegii præd' pro tempore exiſten' deliberaretur*, and there then by their Warrant in Writing, under their Common Seal, did commit the Plain. to the Priſon of the *Compter* of *London*, &c. *abſq; ballivo ſive manucapt' ad Cuſtagia & onera ipſius* T. Bonham, *donec præd'* T. Bonham *per præcept' Præſiden' & Cenſor' Collegii præd' ſive ſucceſſor' ſuor' liberatus eſſet*; and Dr. *Atkins* then Preſident, and the Cenſors, and *Bowden* and *Taylor* as their Servants, and by the Commandment of the ſaid Preſident and Cenſors, did [illegible] the Plain. with the Warrant, to the Gaol, *&c.* which [illegible] Impriſonm. The Plain. replied and ſaid, That by the [illegible] of 14 *H.* 8. it was further enacted, *And where there in the Diocеſs of* England, *out of* London, *it is not like to find alway Men able ſufficiently to examine (after the Statute) ſuch as ſhall be admitted to exerciſe Phyſick in them, that it may be enacted in this preſent Parliam. That no Perſon from henceforth be ſuffered to exerciſe or practiſe Phyſick through* England, *until ſuch Time that he be examined at* London *by the ſaid Preſident and three of the ſaid Elects, and to have from them Letters Teſtimonial of their approving and examination, Except he be a Graduate of* Oxford *or* Cambridge, *which have accompliſhed all Things for his Form without any Grace:* and that the Plaintiff, *Anno Dom.* 1505. was a Graduate, *ſc.* a Doctor in the Univerſ. of *Cambridge*, and had accompliſhed all Things concerning his Degree for his Form without (*a*) Grace, by Force whereof he had exerciſed and practiſed Phyſick within the City of *London* until the Defend. had impriſon'd him, *&c.* upon which the Defen. demur'd in Law. And this Caſe was often

(*a*) 2 Brownl. 261, 262.

argued

argued by the Serjeants at Bar in divers ſeveral Terms; and now this Term the Caſe was argued by the Juſtices, and the effect of their Arguments who argued againſt the Plaintiff (which was divided into three Parts) ſhall be firſt reported. The firſt was, Whether a Dr. of Phyſick of the one Univerſity or the other, be by the Letters Patents, and by the Body of the Act of 14 *H.* 8. reſtrained from practiſing Phyſick within the City of *London*, &c. The ſecond was, If the Exception in the ſaid Act of (*a*) 14 *H.* 8. has excepted him or not. The third was, That his impriſonment was lawful for his ſaid Diſobedience. And as to the firſt, they relied upon the Letter of the Grant, ratified by the ſaid Act of 14 *H.* 8. which is in the Negative, *ſc. Nemo in dicta civitate*, &c. *exerceat dictam facultatem niſi ad hoc per præfict' Præſidentem & communitatem*, &c. *admiſſus ſit*, &c. And this Propoſition is a general Negative, and (*b*) *Generale dictum eſt generaliter intelligendum*; and *nemo* excludes all; and therefore a Doctor of the one Univerſity or the other, is prohibited within this Negative word *Nemo*. And many Caſes were put where negative Statutes ſhall be taken *ſtrictè & excluſivè*, which I do not think neceſſary to be recited here. Alſo they ſaid, that the Statute of (*c*) 3 *H.* 8. *c.* 11. which in Effect is repealed by this Act of (*d*) 14 *H.* 8. has a ſpecial Proviſo for the Univerſities of *Cambridge* and *Oxford*, which being here left out, doth declare the Intention of the Makers of the Act, that they did intend to include them within this general Prohibition, *Nemo in dicta Civitate*, &c. As to the ſecond Point they ſtrongly held, That the ſaid latter Clauſe, *And where that in the Dioceſs of* England, *out of* London, *&c.* this Clauſe, according to the Words, extends only to places out of *London*, and ſo much the rather, becauſe they provided for *London* before, *Nemo in dicta Civitate*, &c. Alſo the Makers of the Act, put a Diſtinction betwixt thoſe who ſhall be licenced to practiſe Phyſick in *London*, &c. for they ought to have the Admittance and Allowance of the Preſident and College in Writing, under their common Seal; but he who ſhall be allowed to practiſe Phyſick throughout *England*, out of *London*, ought to be examined and admitted by the Preſident and three of the Elects, and ſo they ſaid, that it was lately adjudged in the King's Bench, in an Information exibited againſt the ſaid Dr. *Bonham* for practiſing Phyſ. in *Lon.* for divers Months. As to the third Point they ſaid, That for his Contempt and Diſobedience bef. them at their Aſſembly in their College, they might well commit him to priſ. for they have Authority by the Let. Pat. and Act of Parl. and theref. for a Contem. or Miſdem. bef. them they may commit him. Alſo the Act of (*e*) 1 *M.* has giv. them Power to commit them for every Offen. or Diſob. *contrary to any Artic. or Clauſe contained in the ſaid Grant or Act.* But there is an expre. neg. Artic. in the ſaid Grant, and ratified by the Act of 14 *H.* 8.

(*a*) 14 & 15 H. 8. cap. 5.

(*b*) 11 Co. 59. a. Co. Lit. 36. a. 2 Inſt. 81. Hard. 305.

(*c*) Raſtal. Phyſicians, 1.

(*d*) 14 & 15 H. 8. c. 5. 1 Rolls 598. 4 Inſt. 251. Raſtal's Phyſician 3. 2 Bulſtr. 185. Lit. Rep. 168, 169, 172, 212, 215, 246, 247, 248, 249. 1 Jones 261. Cr. Jac. 121, 159. 160, Cr. Car. 256. Palm. 486. Cart. 215.

(*e*) 1 Mar. c. 9. Raſtal's Phyſician 7. Lit. Rep. 169, 172, 173, 212, 213. 215, 248, 249, 350, 351. 1 Jones 263. Cr. Car. 257. Cro. Jac. 121. 4 Inſt. 251. 2 Brownl. 257, 262, 265, 266. Cart. 115.

Quod Nemo in dicta Civitate, &c. *exerceat*, &c. and the Defendants have pleaded, that the Plaintiff had practiſed Phyſick in *London* by the Space of one Month, *&c.* and therefore the Act of 1 *Mariæ* has authoriſed them to impriſon him in this Caſe; wherefore they concluded againſt the Plaintiff. But it was argued by *Coke* Chief Juſtice, *Warburton* and *Daniel* Juſtices of the Common Pleas, to the contrary. And *Daniel* Juſtice conceived, That a Doctor of Phyſick, of the one Univerſity or the other, *&c.* was not within the Body of the Act, and if he was within the Body of the Act, that he was excepted by the ſaid latter Clauſe; but *Warburton* argued againſt him for both the Points; and the Chief Juſtice did not ſpeak to thoſe two Points, becauſe he and *Warburton* and *Daniel* agreed, that this Action was clearly maintainable for two other Points, and therefore in this Action the Chief Juſtice omitted to ſpeak to the ſaid two Points; but to two other Points, he and the ſaid two other Juſtices, *Warburton* and *Daniel*, did ſpeak, *ſc.* 1. Whether the Cenſors have Power, for the Cauſes alledged in their Barr, to fine and impriſon the Plaintiff. 2. Admitting that they have Power to do it, if they have purſued their Power. But the Chief Juſtice, before he argued the Points in Law, becauſe much was ſaid in Commendation of the Doctors of Phyſick of the College in *London*, and ſomewhat (as he conceived) in Derogation of the Dignity of the Doctors of the Univerſities, he firſt attributed much to the Doctors of the ſaid College in *London*, and confeſs'd that nothing was ſpoke in their Commendation which was not due to their Merits; but yet that no Compariſon was to be made between that private College, and any of the Univerſities of *Cambridge* and *Oxford*, no more than between the Father and his Children, or betw. the Fountain and the ſmall Rivers which deſcend from it; the Univerſity is *Alma* (*a*) *mater*, from whoſe Breaſts thoſe of that private College have ſucked all their Science and Knowledge (which I acknow. to be great and profound) but the Law ſaith, *Erubeſcit lex filios caſtigare parentes*: The Univerſity is the Fountain, and that and the like private Colleges are *tanquam rivuli*, which flow from the Fountain, *& melius eſt petere fontes quam ſectari rivulos*. Briefly, *Academiæ* (*b*) *Cantabrigiæ & Oxoniæ ſunt Athenæ noſtræ nobiliſſimæ, regni ſoles, oculi & animæ regni, unde Religio, humanitas, & doctrina in omnes regni partes uberrime diffunduntur*: But it is true, *Nunquam ſufficiet copia laudatoris, quia nunquam deficiet materia laudis*; and theref. thoſe Univerſities exceed and excel all private Colleges, *quantum inter viburna cupreſſus*. And it was obſerved that K. *H.* 8. in his ſaid Let. Pat. and the K. and the Parliam. in the Act of 14 *H.* 8. in making of a Law concer. Phyſicians, for the more Safety and Health of Men, therein follow the Order of a good Phyſic. (*Rex* (*c*) *enim omn' artes cenſetur habere in ſcrinio pect' ſui*) for, *medicina*

(a) 2 Brownl. 264.

(b) 2 Brownl. 264.

(c) 2 Brownl. 264.

eſt

eſt duplex, removens, (a) *& promovens; removens morbum, & promovens ad ſalutem:* And therefore five manner of Perſons (who more hurt the Body of Man than the Diſeaſe itſelf, one of which ſaid of one of their Patients, *fugiens morbum incidit in medicum*) are to be removed; 1. *improbi.* 2. *avari, qui medicinam magis* (b) *avaritiæ ſuæ cauſa quam ullius bonæ conſcientiæ fiducia profitentur.* 3. *malitioſi.* 4. *temerarii.* 5. *inſcii.* And of the other Part, five manner of Perſons were to be promoted, as appears by the ſaid Act, *ſc.* thoſe who were, 1. *profound.* 2. *ſad.* 3. *diſcreet.* 4. *groundly learned.* 5. *profoundly ſtudied.* And it was well ordained, That the Profeſſors of Phyſick ſhould be profound, ſad, diſcreet, *&c.* and not Youths, who have no Gravity and Experience; for as one ſaith, (c) *In juvene Theologo conſcientiæ detrimentum, in juvene legiſta burſæ detrimentum, in juvene Medico cœmiterii incrementum.* And it ought to be preſumed, every Doctor of any of the Univerſities to be within the Statutes, *ſc.* to be *profound, ſad, diſcreet, groundly learned, and profoundly ſtudied,* for none can there be Maſter of Arts (who is a Doctor of Philoſophy) under the Study of ſeven Years, and cannot be Doctor in Phyſick under ſeven Years more in the Study of Phyſick; and that is the Reaſon that the Plaintiff is named in the Declaration Doctor of Phyloſophy, and Doctor of Phyſick, *quia oportet Medicum eſſe Philoſophum,* (d) *ubi enim Philoſophus deſinit, Medicus incipit:* As to the two Points upon which the Chief Juſtice, *Warburton* and *Daniel*, gave Judgment. 1. It was reſolved by them, That the ſaid Cenſors had not Power to commit the Plaintiff for any of the Cauſes mentioned in the Barr, and the Cauſe and Reaſon thereof ſhortly was, That the ſaid Clauſe, which gives Power to the ſaid Cenſors to fine and impriſon, doth not extend to the ſaid Clauſe, *ſc. Quod nemo in dicta Civitate,* &c. *exerceat dictam facultatem,* &c. which prohibits every one from practiſing Phyſick in *London*, &c. without Licenſe from the Preſident and College; but extends only to puniſh thoſe who practiſe Phyſick in *London, pro delictis ſuis in non bene* (e) *exequendo, faciendo & utendo facultate Medicinæ*, by Fine and Impriſonment: So that the Cenſors have not Power by the Letters Patents, and the Act, to fine or impriſon any for practiſing Phyſick in *London*, but only *pro delictis ſuis in non bene exequendo,* &c. for ill, and not good Uſe and Practice of Phyſick. And that was made manifeſt by five Reaſons, which were called *vividæ rationes*, becauſe they had their Vigour and Life from the Letters Patents, and the Act itſelf; and the beſt (f) Expoſitor of all Letters Patents, and Acts of Parliament, are the Let. Pat. and the Acts of Parliam. themſelves, by conſtruction, and conferring (g) all the Parts of them together,

(a) 2 Brownl. 264.

(b) 2 Brownl. 258.

(c) 2 Brownl. 264.

(d) 2 Brownl. 263.

(e) 2 Brownl. 258.

(f) Godb. 418. 2 Rolls. Rep. 356. Wing. Max. 239.

(g) 2 Co. 55. a. 3 Co. 59. b. Godb. 324. Co. Lit. 381. 5 Co. 99. a.

(a) Wing. Max. 239. (b) Wing. Max. 239. together, (a) *Optima Statuti interpretatrix est (omnibus particulis ejusdem inspectis) ipsum Statutum*; and (b) *Injustum est nisi tota lege inspecta una aliqua ejus particula proposita judicare vel respondere.* The first Reason was, that these two were two absolute, perfect and distinct Clauses, and as Parallels, and therefore the one did not extend to the other; for the second begins, *Præterea voluit & concessit*, &c. and the Branch concerning Fine and Imprif. is Parcel of the 2d Clause. 2. The first Clause prohibiting the Practice of Physick, *&c.* comprehends four Certainties: 1. Certainty of the Thing prohibited, *sc.* Practice of Physick. 2. Certainty of the Time, *sc.* Practise for one Month. 3. Certainty of Penalty, *sc.* 5 *l.* 4. Certainty in Distribution, *sc.* one Moiety to the King, and the other Moiety to the College; and this Penalty he who practises Physick in *London* incurs, although he practises and uses Physick well, and profitably for the Body of Man; and on this Branch the Information was exhibited in the King's Bench. But the Clause to punish *delicta in non bene exequendo*, &c. on which Branch the Case at Bar stands, is altogether incertain, for the Hurt which may come thereby may be little or great, *leve vel grave*, excessive or small, *&c.* and therefore the King and the Makers of the Act could not, for an Offence so uncertain, impose a certainty of the Fine, or Time of Imprisonment, but leave it to the Censors to punish such Offences, *secundum quantitatem delicti*, which is included in these Words, *per fines, amerciamenta, imprisonamenta corporum suorum, & per alias vias rationabiles & congruas.* 2. The Harm which accrues by *non bene exequendo*, &c. concerns the Body of Man; and therefore it is reasonable that the Offender should be punished in his Body, *sc.* by Imprisonment; but he who practises Physick in *London* in a good Manner, altho' he doth it without License, yet it is not any Prejudice to the Body of Man. 3. He who practises Physick in *London*, doth not offend the Statute by his Practice, unless he practises it by the Space of a Month. But the Clause of *non bene exequendo*, &c. doth not prescribe any certain Time, but at what Time soever he ministers Physick *non bene*, &c. he shall be punished by the said second Branch: And the Law hath great Reason in making this Distinction, for divers Nobles, (c) Gentlemen and others, come upon divers occasions to *London*, and when they are here they become subject to Diseases, and thereupon they send for their Physicians in the Country, who know their Bodies, and the Cause of their Diseases; now it was never the Meaning of the Act to bar any one of his own Physician; and when he is here he may practise and minister to another by two or (d) three Weeks, *&c.* without any Forfeiture; for any one who practises Physick *bene*, &c. in *London* (altho' he has not taken any

(c) 2 Brownl. 264. Cart. 115.

(d) 2 Brownl. 264.

any Degree in any of the Universities) shall forfeit nothing, unless he practises it by the Space of a Month; and that was the Reason, that the Time of a Month was put in the Act.

4. The Censors can't be (*a*) Judges, Ministers, and Parties; Judges to give Sentence or Judgment; Ministers to make Summons; and Parties to have the Moiety of the Forfeiture, *quia* (*b*) *aliquis non debet esse Judex in propria causa, imo iniquum est aliquem suæ rei esse Judicem*; and one cannot be Judge and Attorney for any of the Parties, *Dyer* 3 *E.* 6. 65. 38 *E.* 3. 15. 8 *H.* 6. 19. *b.* 20. *a.* 21 *E.* 4. 47. *a. &c.*

(*a*) Co. Lit. 141. a. Hob. 87. Bridg. 11. 2 Brownl. 265. Dyer 220. pl. 14. (*b*) Co. Lit. 141. a.

And it appears in our Books, that in many Cases, the Common Law will (*c*) controll Acts of Parliament, and sometimes adjudge them to be utterly void: For when an Act of Parliament is against Common Right and Reason, or repugnant, or impossible to be performed, the Common Law will controll it, and adjudge such Act to be void; and therefore in 8 *E.* 3. 30. *a. b. Thomas Tregor's* Case on the Statute of *W.* 2. *c.* 38. & *Artic' super Chartas cap.* 9. *Herle* (*d*) saith, Some Statutes are made against Law and Right, which those who made them perceiving would not put 'em in Execution: The Statute of *W.* 2. (*e*) *c.* 21. gives a Writ of *Cessavit hæredi petenti super hæredem tenent' & super eos quibus alienatum fuerit hujusmodi tenementum*: And yet it is adjudged in 33 *E.* 3. (*f*) *Cessavit* 42. where the Case was, Two Coparceners Lords, and Tenant by Fealty and certain Rent, one Coparcener had Issue and dyed, the Aunt and the Niece shall not join in a *Cessavit*, because the Heir (*g*) shall not have a *Cessavit* for the Cesser in the Time of his Ancestor, *F. N. B.* 209. *F.* and therewith agrees *Plow. Com.* 110. *a.* and the Reason is, because in a *Cessavit* the Tenant before Judgment may render the Arrearages and Damages, *&c.* and retain his Land, and that he can't do when the Heir brings a *Cessavit* for the Cesser in the Time of his Ancestor, for the Arrearages incurred in the Life of the Ancestor do not belong to the Heir: and beca. it would be against Common Right and Reason, the Common Law adjudges the said Act of Parliament as to that Point void. The Statute of (*h*) *Carliste*, made *anno* 35 *E.* 1. enacts, That the Ord. of the *Cistertians*, and *Augustines* who have a Covent and common Seal, that the common Seal shall be in the keeping of the Prior, who is under the Abbot, and 4 others of the most grave of the House, and that any Deed sealed with the common Seal, which is not so in keeping shall be void: and the Opinion of the Court, (*in An.* 27 *H.* 6. *Annuity* 41.) was, that this Statute was (*i*) void, for it is impertinent to be observed, for the Seal being in their keeping, the Abbot can't seal any thing with it, and when it is in the Abbot's Hands, it is out of their keeping *ipso facto*; and if the Statute should be (*k*) observed, every Common Seal shall be defeated upon a simple Surmise, which can't be tryed. Note Reader the Words

(*c*) 7 Co. 14. a. Calvin's Case. Hob. 87. 2 Brownl. 198, 265. Hard. 140. (*d*) 8. E. 3. 30. b. (*e*) 2 Inst. 401, 402. (*f*) 2 Brownl. 265. 2 Inst. 402. F. N. B. 209. f. (*g*) 2 Brownl. 265. Ver. N. B. 138. b. 2 Inst. 402. (*h*) 2 Inst. 580, 581, 582, &c. (*i*) 2 Inst. 588. 2 Brownl. 198, 265. (*k*) 2 Brownl. 265. 2 Inst. 587.

of the ſaid Statute at *Carliſle, anno* 35 *E.* 1. (which is call'd *Statutum Religioſorum*) are, *Et inſuper ordinavit Dominus Rex & ſtatuit, quod Abbates Ciſterc' & præmonſtraten' ordin' religioſorum, &c. de cætero habeant ſigillum Commune, & illud in Cuſtodia Prioris Monaſterii ſeu domus, & quatuor de dignioribus & diſcretioribus ejuſdem loci conventus ſub privato ſigillo Abbatis ipſius loci cuſtod' depon', &c. Et ſi forſan aliqua ſcripta obligationum, donationum, empcionum, venditionum, alienationum, ſeu aliorum quorumcunque contractuum alio ſigillo quam tali ſigillo communi ſicut præmittit' cuſtodit' inveniant' a modo ſigillata, pro nullo penitus habeantur omnique careant firmitate.* So the Statute of 1. *E.* 6. *c.* 14. gives Chauntries, *&c.* to the King, ſaving to the Donor, *&c. all ſuch Rents, Services, &c.* and the Common Law controlls it, and adjudges it void as to Services, and the Donor ſhall have the Rent, as a Rentſeck, diſtrainable of common Right, for it would be againſt common Right and Reaſon that the (*a*) King ſhould hold of any, or do Service to any of his Subjects, 14. *Eliz. Dyer* 313, and ſo was it adjudged *Mich.* 16 & 17 *Eliz. in Com' Banco in* (*b*) *Strowd's Caſe.* So if any Act of Parliament gives to any to hold, or to have Conuſans of all manner of Pleas ariſing before him within his Manner of *D.* yet he ſhall hold no Plea, to which he himſelf is party; for, as hath been ſaid, *iniquum eſt aliquem ſuæ rei eſſe Judicem.* 5. If he ſhou'd forfeit 5 *l.* for one Mo. by the firſt Clauſe, and ſhou'd be puniſhed for practiſing at any Time by the ſecond Clauſe, two Abſurdities ſhould follow, 1. that one ſhou'd be puniſhed not only twice, but many times for one and the ſame Offence, And the Divine ſaith, *Quod* (*c*) *Deus non agit bis in idipſum*; and the Law ſaith, *Nemo debet bis puniri pro uno delicto.* 2. It wou'd be abſurd, by the firſt clauſe to puniſh practiſing for a Month, and not for a leſſer time, and by the 2d. to pun. practiſing not only for a Day, but at any time, ſo he ſhall be puniſh: by the firſt branch for one Month by the Forfeit. of 5 *l.* and by the 2d, by Fine and Impriſonment, without Limitation for every Time of the Month in which he practiſes Phyſick. And all theſe Reaſons were proved by two grounds, or Maxims in Law; 1. (*e*) *Generalis Clauſula non porrigitur ad ea quæ ſpecialiter ſunt comprehenſa:* And the Caſe between *Carter* and (*f*) *Ringſtead, Hill.* 34. *Eliz. rot.* 120. *in Communi Banco*, was cited to this Purpoſe, where the Caſe in Effect was, That *A.* ſeiſed of the Manor of *Staple* in *Odiham* in the County of *Southampton* in Fee, and alſo of other Lands in *Odiham* aforeſaid in Fee, ſuffered a Com. Recovery of all and declared the Uſe by Indenture, That the Recoverer ſhould ſtand ſeiſed of all the Lands and Tenements in *Odiham* to the Uſe of *A.* and his Wife, and to the Heirs of his Body begotten; and further, that the Recoverer ſhould

(*a*) Dy. 313. pl. 91. 1 Co 47. a. Day. 2. a. Co. Lit. 1. b. Cro. Car. 82, 83. 2 Roll. Rep. 246, 247. 1 Jones 234. Lit. Rep. 43.

(*b*) 1 And. 45. 3 Leon. 58. 4 Leon. 40, 41.

(*c*) 4 Co. 43. a. (*d*) 2 Ventr. 198. 4 Co. 43. a. 5 Co. 61. a. 11 Co. 59. b. 1 Roll. Rep. 95. Cawly 78. Noy 82. Bridgm. 122. Cro. Jac. 481. Wing. Max. 695.

(*e*) Poſtea 154. b. Raymond 330. Hawkes's Max. 21. Styles 391.

(*f*) Cr. El. 208. 2 Leon. 47. Owen. 84, 85. 1 And. 245. 6 Co. 64. b. 3 Bulſtr. 66, 185. 2 Roll. Rep. 276. Winch. 92. Lane 69. Lit. Rep. 64, 67, 289. Styles 391.

ſhould ſtand ſeiſed to the Uſe of him, and to the Heirs of his Body, and dyed, and the Wife ſurvived, and entred into the ſaid Manor by Force of the ſaid general Words; But it was adjudged, That they did not extend to the ſaid Manor which was ſpecially named: And if it be ſo in a Deed, *a fortiori*, it ſhall be ſo in an Act of Parliament, which (as a Will) is to be expounded according to the Intention of the Makers. 2. (*a*) *Verba poſteriora propter certitudinem addita ad priora quæ certitudine indigent ſunt referenda.* 6 *E.* (*b*) 3. 12. *a. b.* Sir *Adam de Clydrow* Knight, brought a *Præcipe quod reddat* againſt *John de Clydrow*, and the Writ was, *Quod juſte*, &c. *reddat Manerium de Wicomb & duas carucatas terræ cum pertinentiis in Clydrow*, in that caſe the Town of *Clydrow* ſhall not relate to the Manor, *quia non indiget*, for a Manor may be demanded without mentioning that it lyes in any Town, but *cum pertinentiis*, although it comes after the Town, ſhall relate to the Manor, *quia indiget*. *Vide* 3 *E.* 4. 10. the like caſe. But it was objected, That where by the ſecond Clauſe it was granted, that the Cenſors ſhould have *ſuperviſum & ſcrutinium, correctionem & gubernationem omnium & ſingulorum Medicorum*, &c. they had Power to fine and impriſon. To that it was anſwered, 1. That that is but Part of the Sentence, for by the entire Sentence it appears in what Manner they ſhall have Power to puniſh, for the Words are, *ac punitionem eorum pro delictis ſuis in non bene exequendo, faciendo, vel utendo illa facultate*; ſo that without Queſtion all their Power to correct and puniſh the Phyſicians by this Clauſe is only limit. to theſe three Caſes, *ſc. in non bene exequendo, faciendo, vel utendo*, &c. Alſo this Word *punitionem*, is limited and reſtrained by theſe Words, *Ita quod punitio eorundem Medicorem*, &c. *ſic in præmiſſis deliquentium*, &c. which Words, *ſic in præmiſſis deliquentium*, limit the former Words in the firſt Part of this Sentence, *ac punitionem eorum pro delictis ſuis in non bene exequendo*, &c. 2. It wou'd be abſurd, That in one and the ſame Sentence the Makers of the Act ſhou'd give them a general Power to puniſh without Limitation; and a ſpecial Manner how they ſhall puniſh in one and the ſame Sentence. 3. *Hill.* 38 *Eliz.* in a *Quo Warranto* againſt the Mayor and Commonalty of *London*, it was held, That where a Grant is made to the Mayor and Commonalty, that the Mayor for the Time being ſhould have (*c*) *plenum & integrum ſcrutinium, gubernationem, & correctionem omnium & ſingulorum Myſteriorum*, &c. without granting them any Court, in which ſhould be legal Proceedings, that it is good for Search, whereby a Diſcovery may be made of Offences and Defects, which may be puniſhed by the Law in any Court, but it doth not give, nor can give them any irregular or abſolute Power to correct or puniſh any of the Subjects

(*a*) Wing. Max. 67. Lit. Rep. 66.
(*b*) Lit. Rep. 66. Wing. Max. 69. Styles 78.
(*c*) Cart. 120, 121.

Subjects of the Kingdom at their Pleasure. 2. It was Objected, That it is incident to every Court created by Letters Patents, or Act of Parliament, and other Courts of Record, to punish any Misdemeanor done in Court, in Disturbance or Contempt of the Court, by Imprisonment. To which it was answered, That neither the Letters Patents nor the Act of Parliament has granted them any Court, but only an (a) Authority, which they ought to pursue, as it shall be afterwards said. 2. If any Court had been granted them, they could not by any incident Authority *implicite* granted them, for any Misdemeanor done in Court, commit him to Prison without Bail or Mainprize, till he shou'd be by the Commandment of the President and Censors, or their Successors, delivered, as the Censors have done in this Case. 3. There was not any such Misdemeanor for whi. any Court might imprison him, for he only shewed his Case to them, which, he was advised by his Counsel, he might justify, which is not any Offence worthy of Imprisonment. The Second Point was, Admitting that the Censors had Power by the Act, If they had pursued their Authority, or not? And it was Resolved by the Chief Justice, *Warburton*, and *Daniel*, that they had not pursued it for six Reasons. 1. By the Act, the Censors only have Power to impose a Fine, or Amercement; and the President and Censors imposed the Amercement of 5 *l.* upon the Plaintiff. 2. The Plaintiff was summoned to appear *coram Presidente & Censoribus, &c. & non comparuit*, and therefore he was find 10 *l.* whereas the President had no Authority in that Case. 3. The Fines or Amercements to be imposed by them, by Force of the Act, do not belong to them, but to the King, for the King had not granted the Fines or Amercements to them, and yet the Fine is appointed to be paid to them, *in proximis Comitiis*, and they have imprisoned the Plaintiff for Non-payment thereof. 4. They ought to have committed the Plaintiff presently, by Construction of Law, although that no Time be limited in the Act, as in the Stat' of *W.* 2. *cap.* 11. (b) *De Servientibus, Ballivis*, &c. *qui ad compotum reddend' tenentur*, &c. *cum Dom' hujusmodi servientium dederit eis auditores compoti, & contingat ipsos in arrearagiis super compotum suum omnibus allocatis & allocandis, arrestentur corpora eorum, & per testimonium auditorum ejusdem compoti mittantur & liberentur proximæ gaolæ Domini Regis in partibus illis*, &c. In that Case, although no Time be limited when the Accomprant shall be imprisoned, yet it ought to be done (c) presently, as it is held in 27 *H.* 6. 8. *a.* and the Reason thereof is given in *Fogassa's Case, Plow. Com.* 17. *b.* that the Genera. of the Time shall be restrain. to the pre. Time, for the Ben. of him upon whom the Pain shall be inflicted, and therewith agrees *Plow' Com'* 206. *b.* in *Stradling's* Case.

(a) Postea 121. a.

The Second Point.

(b) 2 Inst. 379, 380. W. 2. c. 11. Plowd. 17. b. Rast. Account 2.

(c) Postea 120. b. 2 Brownl. 266. 2 Inst. 380. 2 Bulstr. 139. Fitz. Barr 44. Br. Account 6. Br. Det. 16. Br. Execution 135. Br. Faux Imprisonment 32.

Case. And a Justice (*a*) of Peace upon View of the Force, ought to commit the Offender presently. 5. For as much as the Censors had their Authority by the Letters Patents and Act of Parliament, which are high Matters of Record, their Proceedings ought not to be by *Parol, & eo potius*, because they claim Authority to fine and imprison, and therefore if Judgment be given against one in the Common Pleas in a Writ of (*b*) Recaption, he shall be fined and imprisoned, but if the Writ be Vicontiel in the County, there he shall not be fined nor imprisoned, because *a Writ of* the Court is not of Record, *F. N. B. in Recaption*; so in *F. N. B.* 47. *a.* A Plea of Trespass *vi et armis* doth not lie in the County Court, Hundred Court, *&c.* for they can't make a Record of Fine and Imprisonment; and regularly they who cannot make (*c*) a Record cannot fine and imprison. And therewith agrees 27 *H.* 6. 8. Book of Entries, Tit. Account, fol. — The Auditors make a Record when they commit the Defendant to Prison; A Justice of Piece upon View of the Force may commit, but he ought to make a Record of it. 6. Forasmuch as the Act of 14 *H.* 8. has given Power to imprison till he shall be delivered by the President and the Censors, or their Successors, Reason requires that it shou'd be taken strictly, for the Liberty of the Subject (as they pretend) is at their Pleasure: And this is well proved by a Judgment in Parliament in this very Case; For when this Act of 14 *H.* 8. had given the Censors Power to imprison, yet it was taken so literally, That the Gaoler was not bound to receive such as they shou'd commit to him, and the Reason thereof was, because they had Authority to do it without any Court: And thereup. the Stat. of 1 *Ma.* (*d*) *cap.* 9. was made, that the Gaoler should receive them upon a Penalty, and yet none can commit any to Prison, unless the Gaoler receives him: But the first Act for the Cause aforesaid, was taken so literally that no necessary Incident was implied. And where it was objected, that this very Act of 1 *Mar. cap.* 9. has enlarged the Power of the Censors, and they urg'd it upon the Words of the Act; It was clearly resolved, that the said Act of 1 *Mariæ* did not enlarge the Power of the Censors to fine or imprison any Person for any Cause for which he ought not to be fined and imprisoned by the said Act of (*e*) 14 *H.* 8. For the Words of the Act of Queen *Mary* are, *according to the Tenor and Meaning of the said Act:* Also, *shall send or commit any Offender or Offendors for his or their Offence or Disobedience, contrary to any Article or Clause contained in the said Grant or Act, to any Ward, Gaol, &c.* But in this Case *Bonham* has not done any thing which appears within this Record, contrary to any Article or Clause contained within the Grant or Act of 14 *H.* 8. Also the Gaoler who refuses shall forfeit the double Val. of

(*a*) 2 Brownl. 266. 15 R. 2. cap. 2. 8 H. 6. cap. 9.

(*b*) Antea 60. b. 41. a. 11 Co. 43. b. F. N. B. 73. d.

(*c*) Antea fo. 38. b. 41. a. 60. b. F. N. B. 73. d. 10 Co. 103. a.

(*d*) 2 Brownl. 257, 262, 263, 266. Rast. Phys. 7. Lit. Rep. 169, 172. 173, 212, 213, 248, 249, 350, 351. Cr. Jac. 121. Cr. Car. 257. 1 Jones 263. Car. 115. 4 Inst. 251.

(*e*) 14 & 15 H. 8. cap. 5. Roll. 598. 4 Inst. 251. Rast. Physicians 3. 2 Bulstr. 185. Lit. Rep. 168, 169, 172, 212, 215, 246, 247, 248, 249. 1 Jon. 261. Cro. Jac. 121, 159, 160. Cr. Car. 256. Palm. 486. Cart. 115.

the Fines and Amerciaments that any Offender or disobedient shall be assessed to pay; which proves that none shall be received by any Gaoler by Force of the Act of 14 *H.* 8. but he who may be lawfully fined or amerced by the Act of 14 *H.* 8. and that was not *Bonham*, as by the Reasons and Causes aforesaid appears. And admitting that the Replication be not material, and the Defendants have demurred upon it; yet forasmuch as the Defendants have confessed in the Barr, that they have imprisoned the Plaint. without Cause, the Plaintiff shall have Judgment: And the Difference is, when the Plaintiff (*a*) replies, and by his Replication it appears that he has no Cause of Action, there he shall never have Judgment: But when the (*b*) Barr is insufficient in Matter, or amounts (as this Case is) to a Confession of the Point of the Action, and the Plaintiff replies, and shews the Truth of the Mat. to enforce his Case, and in Judgment of Law it is not material, yet the Plaint. shall have Judgm. for it is true that sometimes the Declaration shall be made good by the Barr, and sometimes the Barr by the Replicat. and sometimes the Replication by the Rejoynder, &c. but the Difference is, when the Declaration wants Time, Place, or other (*c*) Circumstance, it may be made good by the Barr, so of the Barr, Replication, *&c.* as appears in 18 *E.* 4. 16 *b.* But when the Declaration wants Substance, no Barr can make it good, so of the Bar, Replication, *&c.* and therewith agrees 6 *E.* 4. 2. a good case, and *nota* there *Dictum Choke. Vide* 18 *E.* 3. 34. *b.* 44 *E.* 3. 7. *a.* 12 *E.* 4. 6. 6 *H.* 7. 10. 7 *H.* 7. 3. 11 *H.* 4. 24. &c. But when Plaintiff makes Replication, Sur-rejoynder, &c. and thereby it appears, that upon the † whole Rec. the Plaintiff has no Cause of Action, he shall never have Judgment, although the Barr or Rejoynder, *&c.* be insufficient in Matter, for the Court ought to judge upon the whole Record, and every one shall be intend. to make the best of his own Case. *Vide* (*d*) *Ridgeway's Case, in the 3d part of my Reports* 52 *b.* and so these Differences were resolved and adjudged between * *Kendal* and *Helyer*, *Mich.* 25 & 26 *Eliz.* in the King's Bench, and *Mich.* 29 & 30 *Eliz.* in the same Court, between (*e*) *Gallys* and *Burbry*. And *Coke* Chief Justice, in the Conclusion of his Argument observed seven Things for the better Direction of the President and Commonalty of the said College for the future. 1. That none can be punished for practising Physick in *London*, but by Forfeiture of 5 *l.* by the Month, which is to be recovered by the Law. 2. If any practise Physick there for a less Time than a Month, that he shall forfeit noth. 3. If any Pers. prohibited by the Stat. offends *in non bene exeq'*, &c. they may pun. him accord. to the Stat. within the Mo. 4. Those who they may com. to pri. by the Stat. ought to be comm. (*f*) presently. 5. The fines whi. they set

(*a*) Cro. Jac. 133. Doct. Pla. 70, 325. Lit. Rep. 172. Moor 464. 1 Sid. 336. Dyer 29. pl. 62.

(*b*) Cr. Jac. 133. Cr. Car. 5. Mo. 464. Postea 133. b. 9 Co. 110. b. Doct. pla. 70. 325. Palm. 287. Lit. Rep. 172, 252. 2 Bulstr. 94. Antea 93. a. 1 Sid. 336.

(*c*) 7 Co. 25. a Dyer 15. pl. 78. Cr. Car. 209. Co. Lit. 303. b.

† Hob. 199. Hard. 38.

(*d*) Styles 354.

* 3 Co. 52. b.

(*e*) 3 Co. 52. b. Cro. El. 62. 1 Leon. 242.

(*f*) Antea 119. b. b. 2 Brownl. 266. 2 Inst. 380. Fitz. Bar. 44. Br. Account 6. Br. Det. 16. Br. Exec. 135. Br. Faux Imprisonment 32. 2 Bulstr. 139.

ſet, according to the Statute, belong to the King. 6. They can't impoſe a Fine, or Impriſonment without a Record of it. 7. The Cauſe for which they impoſe Fine and Impriſonment ought to be certain, for it is (*a*) traverſable; For although they have Letters Patents, and an Act of Parliament, yet becauſe the Party grieved has no other Remedy, neither by Writ of Error, or otherwiſe, and they are not made Judges, nor a Court given them, but have an (*b*) Authority only to do it, the Cauſe of their Commitment is traverſable in an Action of falſe Impriſonment brought againſt them; as upon the Statute of (*c*) Bankrupts, their Warrant is under the Great Seal, and by Act of Parliament; yet becauſe the Party grieved has no other Remedy if the Commiſſioners do not purſue the Act and their Commiſſion, he ſhall traverſe, that he was not a Bankrupt, although the Commiſſioners affirm him to be one; as this Term it was reſolved in this Court, in Treſpaſs between *Cutt* (*d*) and *Delabarre*, where the Iſſue was, whether *Will. Cheyny* was a Bankrupt or not, who was found by the Commiſſioners to be a Bankrupt *a fortiori* in the Caſe at Bar, the Cauſe of the Impriſonment is traverſable; for otherwiſe the Party grieved may be perpetually, without juſt Cauſe, impriſoned by them: But the Record of a Force made by a Juſtice of Peace is not traverſable, becauſe he doth it as Judge, by the Statutes of (*e*) 15 *R.* 2. and 8 *H.* 6. and ſo there is a Difference when one makes a Record as a Judge, and when he doth a Thing by a ſpecial Authority, (as they did in the Caſe at Bar) and not as a Judge. And afterwards, for the ſaid two laſt Points, Judgement was given for the Plaintiff, *nullo contradicente*, as to them. And I acquainted Sir *Thomas Fleming*, Chief Juſt. of the King's Bench, with this Judgment, and with the Reaſons and Cauſes of it, and he well approved of the Judgment which we had given: And this is the firſt Judgment on the ſaid Branch concerning Fine and Impriſonment which has been given ſince the making of the ſaid Charter and Acts of Parliaments, and therefore I thought it worthy to be reported and publiſhed.

(*a*) 2 Brownl. 266. Hardr. 482.

(*b*) Antea 119. b.

(*c*) 13 El. cap. 7. 1 Jac. cap. 15.

(*d*) 4 Inſt. 277. & 278.

(*e*) 15 R. 2. cap. 2. 8 H. 6. cap. 9.

R Hill.

Hill. 7 Jacobi Regis.

The CASE of the City of *London*.

2 Brownl. 278, 284, Raymond 394. 2 Sid. 120, 121. 3 Bulſtr. 190. 2 Roll. Rep. 158. Styles 479, 480.

AN *Habeas Corpus* was directed *Mich'* 7 *Jacobi*, out of this Court, to the Mayor, Aldermen, and Sheriffs of *London*, to have the Body of *James Wagoner*, who was arreſted in *London*, and remained in the Cuſtody of them, or ſome of them: Sir *Thomas Campbel* Knight, Mayor of *London*, and the Aldermen, and *Sebaſtian Harvy* and *William Cokein*, Sheriffs of *London*, make ſuch a Return, That the City of *London eſt antiqua Civitas, quodque in eadem Civitate talis habetur, & a toto tempore cujus contrarium memoria hominum non exiſtit habebatur conſuetudo, uſitata & approbata*, viz. *quod ſi aliquæ conſuetudines in dicta Civitate obtent' & approbat' in aliqua parte difficiles ſive defectivæ exiſtant, ſeu extiter' aut aliqua in eadem Civitate de novo emergentia ubi remedium prius non exiſtit ſeu extiterit ordinat' emendatione indigeant ſive indigerunt, Major & Aldermanni Civitatis prad' pro tempore exiſtent' de aſſenſu Communitatis ejuſdem Civitatis* (a) *remedium congru' bonæ fidei & rationi conſonum, pro communi utilitate Civium dict' Civitatis, & aliorum fidelium Domini Regis nunc & progenitorum ſuorum ad eandem confluent' apponere poſſint & potuerunt ordinar' quoties & quando eis videbitur expediri, dum tamen ordinatio hujuſmodi Domino Regi nunc & progenitoribus ſuis, & populo ſuo utilis, & bonæ fidei & conſona ſit rationi. Et ulterius ſignificamus quod dicta conſuetudo, & omnes aliæ conſuetudines Civitatis prad' a tempore*

(a) 2 Brownl. 284, 285. Raym. 326, 327.

tempore præd', &c. *uſitatæ, Authoritate Parliamenti Domini* Richardi *nuper Regis Angliæ Secundi poſt Conqueſtum, apud* Weſtm' *anno regni ſui (a) ſeptimo tent' tunc Majori & Communitati ejuſdem Civitatis & ſucceſſoribus ſuis ratificat & confirmat' fuer'. Et nos præfat' Major & Aldermanni ac Vic' Civitat'* Lond' *præd' ulterius certificamus, quod in Communi Concilio tent' ſecundum conſuetud' Civit'* Lond' *in Camera* Guild-hald' *ejuſdem Civitat' decimo quinto die* April' *anno regni Domini noſtri* Jacobi *nunc Regis Angliæ*, &c. *quarto, per* Leonardum Halliday, *Militem, nuper Majorem Civitatis* Lond' *præd', & ejuſdem Civitatis Aldermannos, de aſſenſu Communitatis ejuſdem Civitatis in eodem communi concilio aſſemblat' exiſt' ſecundum præd' conſuetudinem Civitatis præd' ordinat', inactitat' & ſtabilit' fuit, modo & forma, prout in Angl' verbis ſequit'*, viz. Where by the ancient Charters, Cuſtoms, Franchiſes, and Liberties of the City of *London*, confirmed by ſundry Acts of Parliament, no Perſon, not being free of the City of *London*, may or ought to ſell or put to Sale any Wares or Merchandizes within the ſaid City, or the Liberties of the ſame, by Retail, or keep any open or inward Shop, or other inward Place or Room, for Shew, Sale, or putting to Sale of any Wares or Merchandizes, or for Uſe of any Art, Occupation, Myſtery, or Handicraft within the ſame. And whereas alſo *Edward*, ſometime King of *England*, of famous Memory, the Third of that Name, by his Charter made and granted to the ſaid City in the fifteenth Year of his Reign, confirmed alſo by Parliament, amongſt other Things granted, That if any Cuſtoms in the ſaid City before that Time obtained and uſed, were in any Part hard or defective, or any Things in the ſame City newly ariſing, where Remedy before that Time was not ordained, ſhould need Amendment, the Mayor and Aldermen of the ſaid City, and their Succeſſors, with the Aſſent of the Commonalty of the ſame City, might put and ordain thereunto fit Remedy, as often as it ſhould ſeem expedient to them, ſo that ſuch Ordinance ſhould be profitable to the King, for the Profit of the Citizens, and other his People repairing to the ſaid City, and agreeable to Reaſon. And whereas by Force of the ſaid Cuſtoms, Franchiſes, and Liberties, and of the Chart. laſt before mentioned, confirmed as is aforeſaid by Parliament, The Lord Mayor, Aldermen and Commons of the ſaid City did the 12 Day of *October*, in the Third Year of the Reign of *Edward*, ſometime King of *England* the Fourth, as a Thing thought fit and convenient for that Time (amonſt other Things) agree and ordain, That the Basket-makers, Gold-wyer-drawers, or other Foreigners, contrary to the Lib. of the ſaid City, holding open Shops in div. Places of the City, and uſing (*b*) Myſt. within the

(a) 2 Brownl. 284, 285.

(b) Cart. 120.

ſaid City, ſhould not from thenceforth hold Shops within the Liberty of the City aforeſaid; but if they would hold any Shop, or dwell in the ſame Liberty, they ſhould dwell at *Blanch-Appleton*, and there hold Shops, ſo as they might have ſufficient dwelling there. And where alſo the Lord Mayor, Aldermen, and Commons of the ſame City did afterwards, the 16 Day of *May*, in the 17 Year of the Reign of our late Sovereign Lord of famous Memory, King *Hen.* 8. as a Matter thought fit and agreeable for that Time, ordain, eſtabliſh, and enact, That no manner of Perſon or Perſons being eſtrange from the Liberties of the ſaid City, from thenceforth ſhould hold and keep any open Shop within the ſaid City or Liberties of the ſame, neither with any Latteſſes before, nor yet without Latteſſes (certain numbers of poor Men occupying the feat of Botchers, Taylors, and Coblers only excepted) upon Pain of Impriſonment, and alſo to forfeit and to pay 40 *s.* to the Uſe of the Commonalty of this City, as often as he or they ſhould do the contrary. And where alſo the Lord Mayor, Aldermen and Commons of the ſame City did afterwards the 20 Day of *January*, in the ſaid 17 Year of King *Hen.* 8. (reciting that where at a Common Council holden the 16 Day of *May* in the 17 Year of the Reign of King *H.* 8. it was ordained and enacted, That no manner of Perſon or Perſons, being eſtrange from the Liberties of this City, from thenceforth ſhould hold or keep any Shop or Shops within this City or Liberties of the ſame, neither with any Latteſſes before, nor yet without any Latteſſes, upon Pain of Impriſonment) further ordain and eſtabliſh, That if any Perſon or Perſons, being Foreigners, ſhould hold and keep open any open Shop or Shops, as is aforeſaid, he ſhould forfeit for every time ſo doing 40 *s.* to be levied by Diſtreſs, to the Uſe of the Commonalty of the ſaid City, by the Chamberlain for the Time being, or oth. Officer of this City, and alſo have Impriſonment by the Diſcretion of the Mayor and Aldermen for the Time being. Now foraſmuch as divers and ſundry Strangers and Foreigners from the Liberties of the ſaid City (nothing regarding the ſaid antient Charters, Franchiſes, Cuſtoms or Liberties of the ſaid City, and Acts and Ordinances heretofore made according to the ſame, but wholly intending their private Profit) have of late Years deviſed and practiſed by all ſiniſter and ſubtil Means how to defraud the ſaid Charters, Liberties, Cuſtoms, good Orders and Ordinances, and to that End do inwardly, in private and ſecret Places, uſually and ordinarily ſhew, ſell, and put to ſale their Wares and Merchandizes, and uſe Arts, Trades, Occupations, Myſteries, and Handicrafts within the ſaid City and Liberties of the ſame, to the great Detriment

and

and Hurt of the said City, who pay Lot and Scot, bear Offices, and undergoe other Charges which Strangers and others not free are not chargeable withal, nor will perform. For Reformation of which Disorders, and for avoiding of such Prejudice and Damage as thereby groweth to the Freemen of the said City, and is now more of late than was in any Time heretofore suffered, and to provide for the common Profit and Good of the Freemen and Citizens of this City; it is therefore by the Lord Mayor, Aldermen, and Commons in this Common Council assembled, ordained and established, That no Person whatsoever (not being free of the City of *London*) shall at any Time after the Feast of St. *Michael* now next ensuing, by any Colour, Way, or Mean whatsoever, either directly, or indirectly, by himself, or by any other, shew, sell, or put to Sale, any Wares or Merchandizes whatsoever, by Retail, within the City of *London*, or the Liberties or Suburbs of the same, upon Pain to forfeit to the Chamberlain of the City of *London* for the Time being, to the Use of the Mayor and Commonalty, and Citizens of the said City, the Sum of 5 *li.* of lawful Money of *England*, for every Time wherein such Person shall shew, sell, or put to Sale any Wares or Merchandizes by Retail, within the said City, Liberties, or Suburbs thereof, contrary to the true Intent and Meaning hereof; and it is further ordained and established, That no Person whatsoever (not being free of the City of *London*) shall at any Time after the said Feast of St. *Michael* now next ensuing, by any Colour, Way or Mean whatever, directly or indirectly, by himself or other, keep any Shop or other Place whatsoever, inward or outward, for Shew or putting to Sale of any Wares or Merchandizes whatsoever by Way of Retail, or use any Art, Trade, Occupation, Mystery, or Handicraft whatsoever, within the said City, or the Liberties or Suburbs of the same, upon Pain to forfeit the Sum of 5 *li.* of lawful Money of *England*, for every Time wherein such Person shall keep any Shop or other Place whatsoever, inward or outward, for Shew, Sale, or putting to Sale of any Ware or Merchandizes whatsoever by Way of Retail, or use any Art, Trade, Occupation, Mystery, or Handicraft whatsoever within the said City, or Liberties or Suburbs of the same, contrary to the true Intent and Meaning hereof: All which Pains, Penalties, Forfeitures and Sums of Money to be forfeited by virtue of this Act and Ordinance, shall be recovered by Action of Debt, Bill, or Plaint, to be commenced and prosecuted in the Name of the Chamberlain of the City of *London* for the Time being, in the King's Majest. Court to be holden in the Chamber of

the *Guild-Hall* of the City of *London*, before the Lord Mayor and Aldermen of the ſaid City, wherein no Eſſoin or Wager of Law ſhall be admitted or allowed for the Defendant; And that the Chamberlain of the ſaid City for the Time being ſhall in all Suits to be proſecuted by virtue of this Act or Ordinance againſt any Offender, recover the ordinary Coſts of Suit to be expended in and about the Proſecution thereof: And further, that one equal third Part of all Forfeitures to be recovered by virtue hereof, (the Coſts of the Suit for the Recovery of the ſame being deducted and allowed) ſhall be after the Recovery and Receipt thereof paid and delivered to the Treaſurer of *Chriſt*'s Hoſpital, to be employed towards the Relief of the poor Children to be brought up and maintained in the ſaid Hoſpital. And one other equal third Part, to him or them which ſhall firſt give Information of the Offences for which ſuch Forfeitures ſhall grow, and proſecute Suit in the Name of the Chamberlain of the ſaid City for Recovery of the ſame (any Thing in this Act to the contrary notwithſtanding.) Provided always, That this Act or Ordinance, or any Thing therein contained, ſhall not extend to any Perſon or Perſons for bringing or cauſing to be brought any Victuals to be ſold within this City and the Liberties thereof, but that they and every of them may ſell Victuals within the ſaid City and the Liberties thereof; as they might lawfully have done before the making hereof; any Thing herein contained to the contrary thereof in any wiſe notwithſtanding. *Ulteriuſque nos præfat' nunc Major & Aldermanni ac Vicecom' Civitatis præd' certificamus, quod ante adventum Brevis dicti Domini Regis nobis directi, & hic huic ſchedulæ annex'* Jac' Wagoner *in Brevi illo nominat' captus fuit in Civitat' præd' & in priſona dicti Dom' Regis nunc ſub cuſtod' noſtrum præfat' Vic' detent' fuit virtute cujuſd' Billæ original' de pl' debiti ſuper demand' quinque librarum legalis monetæ Angl' verſus ipſum, 9 die menſis Sept' anno regni Domini Regis nunc ſeptimo, ad Cur' præd' Dom' Reg' coram* Humfredo Weld *Milite, nuper Majore, & Aldermannis Civitat' præd' in præd' Camera* Guildhal' *cjuſd' Civitatis, ſecund' conſuet' Civitat' præd' tunc tent' ad ſectam* Cornelii Fiſh, *Camerarii Civitat'* Lond' *ſuper Act' Communis Concilii præd' præd'* 15 *die* Apr' *an'* 4. *præd' ut præſ. confect' affirmat', cujus quidem billæ orig' tenor ſequitur in hæc verba, ſcil'* Cornel' Fiſh, *Camerarius Civitat'* Lond' *qui 7 die* Sept' *anno regni Dom' noſtri* Jacobi *nunc Regis Angliæ, &c. ſeptimo, & ſemper poſtea hucuſque fuit & adhuc exiſtit Camerarius dictæ civit', per* Robertum Smith *attornat' ſuum petit verſus* Jac' Wagoner *quinque libras legalis Monetæ Angliæ quas ei debet & injuſte detinet, &c. eo quod cum in communi concilio ſecund' conſuet' civitat' præd' in camera* Guid-

hald'

hald' *dictæ civitat' ſituat' in parochia ſancti* Michael' *in* Baſſieſhaw *in Warda de* Baſſieſhaw Lond' *præd' decimo quinto die* Aprilis, *an' regni Dom' noſtri* Jacobi *nunc Regis Angl'*, &c. *quarto, vigore & authoritate communis concilii illius ordin' & ſtabilit' extitit, quod nulla perſona quæcunque non exiſtens liber civitat'* Lond' *ad aliquod tempus poſt feſtum ſancti* Mich' *tunc prox' ſequen' per aliquem colorem, viam aut modum, quæcunque ſive directe vel indirecte, per ſe vel per aliquem alium, oſtenderet, venderet, aut ad venditionem poneret, aliqua mercimonia aut merchandiſas quæcunque per retal' infra civitat'* Lond' *aut libertates aut ſuburb' ejuſd' ſub pœna forisfacere Camerario civit'* Lond' *pro tempore exiſten' ad uſum Majoris & Commun' ac Civium dict' civitat' ſummam quinque librarum legalis monetæ Angliæ pro quolibet tempore quo talis perſona oſtenderet, venderet, aut venditioni exponeret, aliqua mercimonia aut merchandiſas per retal' infra dict' civitat' libertat' aut ſuburb' ejuſdem, contra veram intentionem actus communis concilii præd'. Cumque tunc & ibid' authoritate præd' ulterius ordinat' & ſtabilit' extitit, quod nulla perſonæ quæcunque non exiſtens liber civit'* Lond' *ad aliquod tempus poſt dictum Feſtum ſancti* Mich' *tunc prox' ſequent' per aliquem colorem, viam aut modum, quæcunque directe vel indirecte, per ſe vel per aliquem alium, teneret aliquam ſhoppam aut alium locum quemcunque intra vel extra, Angl'* inward or outward, *pro oſtenſione, venditione, aut poſitione aliquorum mercimoniorum aut merchandiſarum quorumcunque ad venditionem per viam retal', Angl'* by way of Retail, *aut uteretur aliqua arte, artific', occupation', myſter', aut manuali occupatione, quibuſcunque, Angl'* any Art, Trade, Occupation, Myſtery, or handicraft whatſoever, *infra civitat'* Lond' *aut libertat' aut Suburb' ejuſd' ſub pœna forisfacere ſummam quinque librarum legalis monetæ Angliæ, pro quolibet tempore quo talis perſona teneret aliquam ſhoppam, aut alium locum quemcunque, infra vel extra, Angl'* inward or outward, *pro oſtenſione, venditione, aut poſitione aliquorum mercimoniorum aut merchandiſarum quorumcunque ad venditionem per viam retal', aut uteretur aliqua arte, artificio, occupatione, myſterio, aut manuali occupatione, quibuſcunque Angl'* any Art, Trade, Occupation, Myſtery, or Handicraft whatſoever, *infra dict' Civitatem, aut libertat' aut ſuburb' ejuſdem, contra veram Intentionem actus præd'. Cumque tunc & ibidem Authoritate præd' ulterius inactitatum extitit, quod omnes quæ quidem pœnæ, pœnalitates, forisfacturæ & pecuniæ ſummæ forisfaciendæ virtute dicti actus ſive*

ordinis, Angl' Ordinance, *recuperarentur per actionem debiti, bill', sive querel', commensand' & prosequend' nomine Camerarii Civit'* Lond' *pro tempore existentis, in curia regiæ Majestatis tenend' in camera* Guildhald' *civitat'* Lond' *coram Domino Majore & Aldermannis ejusdem civitat' in quibus null' esson' aut legis vadiatio admitteretur aut allocaretur pro defend'. Et quod Camerarius dictæ Civitatis pro tempore existens in omnibus Sectis prosequend' virtute dict' act' sive ordinis, Angl'* or Ordinance, *contra aliquem offensorem, recuperaret ordinar' custag' Sectæ, expendend' in & circa prosecutionem ejusdem. Et ulterius, quod una æqualis tertia pars omnium forisfactur' recuperand' virtute dict' act' (custag' Sectæ pro recuperatione earum existent' deduct. & allocat') post recuperationem & receptionem inde solveretur & deliberaretur Thesaurario Hospitalis* Christi *disponenda, Ang'* to be employed, *erga opem pauper' puerorum educandorum & manutenendorum in dicto Hospitali: Et una alia æqualis tertia pars illi vel' illis qui primum daret information' de offensis pro quibus talcs forisfacturæ surgerent, Angl'* should grow, *& prosequer' Sectam in nomine Camerarii dictæ civitatis pro recuperatione earund', aliquo in dicto actu in contrar' non obstante, prout per præd' actum communis concilii præd' plene liquet. Præd' tamen defendens, actum communis concilii præd' minime ponderans, nec pœnam in eodem contentam aliqualiter verens post dict' festum Sancti* Michaelis *in actu præd' mentionat' & ante affirmationem hujus billæ originalis,* scil. *dicto septimo die* Septembris, *anno regni Domini nostri* Jacobi *nunc Regis Angliæ,* &c. *septimo præd', infra dict' civitatem* London, viz. *in parochia Sancti* Christopheri London' *non existens persona liber dictæ civitatis usus est manuali occupatione* of a Tallow Chandler *contra veram Intentionem actus communis concilii præd' per quod actio accrevit præfato quærenti ad petend' exigend' & habend' de præfato defend' dict' quinque libras modo petit' quas dict' defend' præfato quærenti nondum solvit, licet sæpius,* &c. *ad damnum dicti querentis quinque solidorum & inde producit Sectam,* &c. *super quam quidem billam original' partes præd' placitaverunt, & sic indeterminat' dependit,* &c. *Et hæc est unica causa captionis & detentionis præd'* Jacobi Wagoner *in prisona & sub custodia præd' quam una cum corpore suo coram dict' Justiciariis dicti Domini Regis apud Westmonaster' ad diem in brevi præd' content' parat' habemus, una cum dicto brevi, prout nobis interius per idem Breve præcipitur.*

Cro. El. 352, 353.

In this Case it was resolved, That the said Custom of *London, That no Person whatsoever, not being free of the City of* London, *shall by any Colour, Way, or Mean whatsoever, directly or indirectly, by himself or any other, keep any Shop or any other Place whatsoever, inward*

or

or outward, for shew or putting to Sale of any Wares or Merchandizes whatsoever by way of Retail, or use any Trade, Occupation, Mystery or Handicraft, for hire, gain or sale, within the City of London, is, upon the whole Matter disclosed in the Return, a good (*a*) Custom; and that such Constitution made according to the Custom alledged in the Return, upon Pain of Forfeit. of 5 *li.* was also good. And as to that, 1. It was resolved, That there is a Differ. between such a Cust. within a City, *&c.* and a Chart. grant. to a City, *&c.* to such Effect; for it is good by way of Cust. (*b*) but not by Grant: and theref. no Corpor. made with. time of Memory can have such Priv. unless it be by Act of Parl. So a Cust. that Goods foreign bought (*c*) and foreign sold within a City shall be forfeit. is good, as app. *Dyer, Mich.* 10 *&* 11 *Eliz.* 279. But such Privil. can't begin by Chart. And theref. in the 5 Part of my *Rep. Trin.* 41 *Eliz.* Betw. *Waltham* and *Austin in Com' Banco*, the Case was, That K. *H.* 6. grant. to the Corpora. of (*d*) *Dyers* in *London*, Power to search, *&c.* and if they found any Cloth died with *Logwood*, that the Cloth should be forf. and it was adjudged, That by the Patent no Forfei. can be imposed on the Goods of a Subj. and theref. *in hujusmodi Casubus fortior & potentior est vulgaris Consuetudo, quam regalis Concessio.* So it app. by the *Reg.* 105. *b.* the Custom of *Rippon* is, *Quod Archiepiscopus* (*e*) *Eborum ratione Domini sui de Ripon talem Libertatem in Villa prad' habeat & a tempore &c. habuit quod nullius in ead' Villa uti debeat seu consuevit officio sive mysterio Tinctoris sine licentia ipsius Archiepiscopi.* But *Trin.* 44. *Eliz.* in an Action on the Case between *Edw. Darcy*, Esq; Plaintiff, and *Thomas Allen* Defend. the Case was, That Queen *Eliz.* granted to the Plaintiff, that he should have the sole Traffick with (*f*) Playing-cards, and should only import them from beyond the Sea into this Kingdom, also that he should have the sole making of Playing-cards in this Realm, in such ample Manner as *Ralph Bows* had it before; and it was adjudg. that that Grant to make Playing-cards only, and to restra. Trade and Traffick was void, because Trade and Traffick is the Life of every Commonwealth, and especially of an Island. And it is true, Trade and Traffick can't be maintained or increas'd without Order and Government; and theref. the King may erect *Guildam mercatoriam, i. e.* a Fraternity or Socie. or Corpor. of Merch. to the End that good Order and Rule should be by them obser. for the Encrease and Advance. of Trade and Merchand. and not for the Hindrance or Diminu. of it. And it is to be known That (*g*) *Guildan* is a *Sax.* word, and sig. *solvere, i. e.* That all of such Frater. shall be subj. to pay Scot and Lot: And theref. at this day such part of the Coun. wh. is contrib. amon. themselves. to pay comm. Char. is called the *Guildable*; and if there be any special Liberty, it is called the Franchise. 8. *E.* 3. (*h*) 37. *a. b. Jefferey at Hay* brought an Action of

(*a*) Bridgman 140. 4 Inst. 249. Cart. 169.

(*b*) Lutw. 564, Salk. 204. 2 Rol. Rep. 203. Mod. Rep. 18. 11 Co. 54. a. 87. b. Bridgman 140. Cart. 115. Cr. El. 803.

(*c*) Moor 585. 2 Keb 397. 2 Rol. 597. Postea 126. a. 128. a. 2 Brownl. 287. 1 Jones 162. Dy. 279. pl. 10.

(*d*) 2 Inst. 47. Postea 127. b. Palm. 5.

(*e*) 2 Brownl. 178, 179. Owen. 67.

(*f*) 2 Inst. 47. 2 Brownl. 287. Hob. 212. 11 Co. 84. b. 86. a. Moor 671, 672, &c. Noy. 173, 174, &c. 3 Inst. 182. 3 Keb. 265. Hard. 55. 2 Rol. 214.

(*g*) 2 Brownl. 286.

(*h*) 2 Brownl. 287, 178. 2 Bul. 189.

Treſpaſs againſt *William at Ford* and *Robert Gray*, that they wrongfully with Force had broken his Fold at *Haſtings*: The Defend. pleaded, That *Johan de Frichborn* was and yet is ſeiſed of the Manor of *Haſtings* in Fee, and that the ſaid *Johan* and her Anceſtors, and all the Lords of the ſaid Man. whoſe Eſtate ſhe has, *a tempore cuj' &c.* have uſed to have this Franchiſe, *i.* to have a free Fold, (*i. liberam Faldam*) thro' the whole Town of *Haſtings*, and to have a Lock of Wool of the Sheep, ſo that none in the Town of *Haſtings* ought to have free Fold with. Agreem. made with her; and if any did erect a Fold without Agreement, *&c.* that the Lords for the Time being had uſed to abate it, and that *Jeffery at Hay* the Plaintiff, ſet up a new Fold with. Agreem. whereſ. the Defendants, as Serv. to the ſaid *Johan*, came and disjoined the Hurdles, and abated them, *&c.* And there *Parning* Serjeant took two Exceptions to this Preſcrip. 1. That it is in the Negat. *ſcil.* That none ought to have a Fold. 2. Becauſe every one of comm. Right might have a Fold in his own Land, and thereſ. it would be aga. Reaſon to ouſt him of that which the Com. Law gives him; and although he ſaid that the Lords have uſed to have a Free Fold, that is of common Right alſo, which can't take from a Man that which common Right gives him: *& non allocatur*, becauſe the Preſcription contains an Affirmative with a Negative, and every Preſcription is againſt common Right: then the Plaintiff replied and ſaid, that the Defendants have juſtified the abating of the Fold, by Reaſ. of the Seigniory of *Johan*; to which we ſay, that the Place where the Fold is ſet, is out of the Lordſhip of *Johan*, &c. and no Plea, becauſe the ſaid *Johan* claims the ſaid Franchiſe through the whole Town of *Haſtings*, as well out of her Lordſhip as within; whereupon the Plaint. made another Replication, By which Caſe it appears that although folding of Sheep is for the Maintenance of Tillage (which is ſo much eſteemed and favoured in Law) yet by Cuſtom and Uſage a Man may be barred thereof upon his own Land, and another than he, of wh. the Land is held, may have it; and therewith agr. 3 *E.* 3. 3. *a. John de Sedgeford's* (*a*) Caſe, where the Prior of *Trinity* of *Norwich* Lord of the Manor of *Sedgeford*, made the like Preſcripti. *Mich.* 32 *&* 33 *Eliz. in Banco Regis*, Sir *George* (*b*) *Farmour* bro. an Acti. on the Caſe aga. *Brook*, and ſhewed that he was ſei. of the Man. of *Torceſter* in the County of *Northamp.* in Fee, and that all the Tenem. of the ſaid Town are held of his ſaid Man. and ſhew'd that *a temp' cuj' &c.* he, and all thoſe, *&c.* had had a Bake-houſe Parcel of the ſaid Man. maintain. at their Cha. and that this Bake-houſe was ſuffi. to bake Bread for all the Inhab. and for all Paſſen. thro' the ſame Town; and the Bre. ſo bak. had uſed, *&c.* to be ſold at reaſona. Prices, and that no other Perſon within the ſaid Town has uſed to bake any Bread to ſell to any Perſon; And it was adjudged

(*a*) 2 Brownl. 287.

(*b*) 1 Rol. 559. 1 Leon. 142. Owen 67. Ray. 327. Bridg. 140. 2 Brownl. 179. 2 Bulſtr. 195. Cr. El. 203, 204. Styles 421. 2 Ro. Rep. 201. Lit. Rep. 250.

a reasonable Custom by Sir *Chr. Wray*, *& totam Curiam*, and yet this Custom restrains a Man from exercising his Trade within a certain Place. *Vide Regist'* 105, 127. 11 *H.* 6. 19. 9 *E.* 3. 4. There are divers Cust. in *Lond.* which are against com. Right, and the Rule of the com. Law, and yet they are allowed in our Books, and *eo potius*, because they have not only the Force of a Cust. but are also support. and fortifi. by Authority of (*a*) Parliament. 1. They have a Cust. concern. the Arrest and Imprison. of the Body of a Man, as the Creditor may arrest the (*b*) Debt. before the Day of Paym. to drive him to find Sureties, L. 5 *E.* 4. 30. *a.* 11 H. 6. 3. *a.* and 2 *Hen.* 7. 15. 2 *Hen.* 4. 12. *b.* 2. They have a Cust. to enter the House of anoth. which is his (*c*) Castle; and theref. the Cust. of *Lond.* is, That when a Chaplain or a Priest has a Wom. in his House or Chamb. and one hath an ill Suspicion thereof, he who hath such Suspicion may come to the Constable of the Ward (*d*) or Beadle, and with him may enter into the House or Chamber of the Chaplain or Priest, and commit the Offend. to Pri. 2 *H.* 4. 12. *b.* 2 *H.* 7. 15. 3. By their Custom the Goods of a Man in which he hath an absolute Property may be forfeited, as in the Case before of Foreign bought and Foreign sold. 4. They have a Custom which alters the Course of Justice, *scil.* where an Action is brought bef. one Judge, to remove it pending the Plea before ano. as 10 *H.* 6. 15. *a.* In an Acti. of Debt on an Escape of a Man taken by *Capias* on a Stat. Merch. at the Plaintiff's Suit, The Defend. said, That the Cust. of *Lond.* is, that where a Plaint is affirmed bef. the Sher. of *Lond.* (*e*) that the Mayor at the Suggestion of the Plaint. or Defend. may send for the Parties, and if it be found on Examina. before the Mayor, that the Plaint. is satisfi. he may award that the Plaint. shall be barred; and that the Plaint. affir. a Plaint of this Matter, and was examined before the Mayor, and on Examination it was found that the Part was paid, and that the Plaintiff had taken a Bond for the Residue, *ideo* the Mayor awarded that he should be barred, and it was adjudged, that the Custom was good, for that Examination was pending the Action; and *e contra*, if they prescribe to examine it after (*f*) Judgment. *Vide* 1 *E.* 4. 6. *b.* Executors charged in *London* on a simple (*g*) Contract; 15 *Eliz. Dyer*, in *London* the Mayor (*h*) who is the Coroner shall not pronounce the Judgment upon the Outlawry, but the Record. And many Except. were taken to the Return, beca. the Cust. alledged in the Begin. of the Return was not pursued. For the Cust. there alled. consists upon two general Parts, *scil.* the Misch. and the Remedy; the Misch. were three. 1. If any were diffic. 2. If defect. 3. If a new Case ari. which *emend' indigeat*; the Reme. is That the Ma. and Ald. with the Cons. of the Commonal. have pow. by the Cust. *apponere*

(*a*) Cr. Car. 347. Hard. 303.
(*b*) Hard. 303. Br. London 24.
(*c*) 2 Co. 32. a. 5 Co. 91. b. 7 Co. 6. a. Cr. Eliz. 753. 1 Bul. 146. 11 Co. 82. a.
(*d*) Hard. 303. Br. Trespass 74. Br. London 5. Br. Custom 10.
(*e*) 4 Inst. 248. 10 H. 6. 14. b. 15. a. Fitz. Prescription 4. Br. London 30. Br. Custom 60.
(*f*) Hard. 303. 4 Inst. 248.
(*g*) 5 Co. 82. b. Cr. Eliz. 469. Noy 53. Swinb. 328, 329. Postea 133. a.
(*h*) Dy. 317. pl. 6. Co. Lit. 288. b.

ponere remedium, which Remedy ought to have five Qualities; 1. *Remedium debet eſſe congruum*, It ought to have fit Proportion and Congruity. 2. It ought to be *bonæ fidei conſonum*. 3. It ought to be *rationi conſonum*. 4. *Pro com' utilita' Civium & aliorum fidelium ad eandem Civitatem confluentium*. 5. *Quod ſit utile Regi & populo*. And it was objected, that the ſaid Conſtitution appoints a Remedy which has but one of the ſaid five Qualities; for it provid. only, as app. by the expreſs Words of the Conſti. for the Bene. of the Freemen of the ſaid City, *ſcil. for avoiding of ſuch Prejudice and Damage as groweth to the Freemen of the ſaid City*, &c. *and to provide for the common Profit and Good of the Freemen and Citizens of this City, It is therefore*, &c. by which it appears that this Remedy was only made for the Freemen of the City, and ſo not purſuant, *& non allocatur*, becauſe it appears to the Court, that this Remedy has all the ſaid five Qualities, and therefore it was reſolved, that it need not be averr'd by the Party. *Vide* 46 *E.* 3. 16. *b.* no Price (*a*) of Money ſhall be expreſſed in the Writ, becauſe it appears of it ſelf, 12 *H.* 4. 17. the Son (*b*) within Age brings an Aſſiſe of Mortdanceſter, he need not averr, that it is within the time of Limitation, for it appears. *Vide Plow' Com'* (*c*) *Partridge's Caſe*, 87. the ſame Ground, *Vide* 26 *H.* 6. Gard (*d*) 58, *&c.* But for the bet. Underſtand. of the true Rea. of the Reſolu. in this Caſe; Firſt, It was obſerved, That one may be *Liber* (*e*) *homo*, that is, a Freeman of *Lond.* by three Ways, *ſcil.* 1. By Service, as he who ſerves his Apprenti. 2. By Birthright, as he who is the Son of a Freeman of *London*; 3. By Redemption, that is, by Allowance of the Court of Mayor and Aldermen, and all theſe three Ways are allowed by the Cuſtom of the City of *London*, and by no other Means can a Man become a Freeman of *London*: for none can be made free of the City of *London* by Chart. and therefore it appears in *Rot' Pat' 32 E. 3. in Turri London*, That King *Ed.* 3. granted to *John* (*f*) *Falcount de Luca* Apothecary Citizen of *London*, *Quod ipſe omnibus Libertatibus quas Cives Civitatis prad' habent in eadem Civitate & alibi infra regnum noſtrum Angliæ, habeat, gaudeat, & utatur, & quod de tribus denariis de libra, & omnibus aliis præſtationibus & cuſtumis quas alienigenæ de bonis & merchandiſis ſuis infra reg' Angliæ ſolvere tenentur, de propriis bonis & merchandiſis ipſius* Johannis *infra idem regnum ad totam vitam ſuam ſit quietus, & quod plus quam alii Cives noſtri* London *indigenæ pro cuſtumis merchandiſarum & aliorum bonorum ſuorum nobis ſolvunt ſolvere non teneatur, nec ad hoc aliqualiter compellatur*. But all theſe Words do not make him a Freeman of *Lond.* for he ought to atta. unto it by one of the ſaid three Ways, accord. to the ſaid Cuſt. And it was ſaid, that he was the firſt Apo. that ever was in this Kingdom.

(*a*) 9. Co. 54. b. Doct. pla. 86. Fitz. brief. 602. Br. faux Latin &c. 13. 46 E. 3. 35. a.

(*b*) 9 Co. 54. b Doct. pla. 86. 13 H. 4. 17. a. Br. mort. dauncester 8. 7 Co. 39. b. 11 Co. 25. a.

(*c*) 9 Co. 54. b.

(*d*) 9 Co. 54. b.

(*e*) 2 Brownl. 286. 4 Inſt. 250. 2 Anderſ. 276, 277 2 Bulſtr. 189, 190. 3 Keb. 325.

(*f*) 2 Brownl. 286, 287.

And

And it was resolved, That it appears that the Remedy appointed by the said Constitution has all the said five Qualities. 1 *Quod Remedium præd' fuit congruum*, that is, apt and proportionable to the Offence, for it appears by Act of Common Council in 3 *E.* 4. which inflicts the Penalty of 40 *s.* upon a Foreigner who keeps an open Shop, *&c.* that he who keeps an inward Shop is a greater Offend. than he who keeps an open Shop; for *London* is a Market (*a*) overt every Day, except only the (*b*) Sabbath-day, but secret places in Corners, as the Case of the said *James Wagoner* is, is more dangerous and offensive than outward Shops, for there he may use Deceit, and is not sub. to any Search; (*c*) *Qui male agit odit lucem*, and, *omnia delicta in aperto leviora sunt.* In 11 *H.* 7. 19. *a. b.* The Prior of *Dunstable* brought an Action on the Case aga. *J. B.* Butcher, and declar. that he was Lord of the Town of *D.* and that he, *&c.* had a Market twice in the Week, and the Correcti. of the said Market, and that all Butchers, and all oth. who sell Meat or any other Commo. which came to the said Market, that they ought to sell them in the High-street of the said Town, upon the Prior's Stalls, pay. 1 *d.* to the Prior; and that the Defend. is a Butch. and sold his Meat such a Market-day within his own House *occulte*, and had procured others so to do, by which, *&c.* the Defend. pleaded that he was a Housholder in the said Town of *D.* and all those who are Household. in the said Town have used *a tempore cujus, &c.* to sell their Wares, *&c.* ev. Market-day in their own Hou. or where ever else they pleased; and there *Cotesmore* who gave the Rule in the Case, and the Reason of it, said, this Prescrip. is not to the Purp. For if the Prior had a Market within the Town, and is Lord of the Town, you can't prescribe to sell Meat in your own House on the Market Day; For the Market can't be but in an open Pla. and the Prior then wou'd lose the Bene. of his Market, if they might sell their Wares in their Hou. and also where he has the Correct. of the Mark. and to see if the Things wh. shall be sold are lawful and vendible, which can't be tried by his Offi. if it be not in open Mark. and also he wou'd lose his Toll of the Things sold; so that when the Market belongs to the Prior, which ought to be held in the Market-place appoin. for that Purpose, he can't hold a Market in his own House, but in the common Place, upon the Market-day; wherefo. *&c.* And as it hath been said, *London* has a Market every Day in the Week, *Sunday* only excepted. *Vide Mich.* 32 *&* 33 *Eliz.* in the Fifth Part of my *Reports*, 63. *a.* a Constitution (*d*) in *London*, That all Broad-cloth by Cit. or For. shall be put to Sale at *Blackwell-hall*, so that it may ap. to be saleable And note there a Pena. infli. for the Restra. of a lawf. Act, but here, of an unlaw. And theref. if a Foreig. who keeps an open Shop shall for. 40 *s.* he who is a Forei.

(*a*) 2 Brownl. 288. 5 Co. 83. b. Dyer 122. pl. 16. Cr. Eliz. 454. 35. H. 6. 29. b. Moor 360, 625. 2 Inst. 713. Poph. 34. 1 Anderf. 344. 2 Anderf. 115. 3 Co. 78. b. 9 Co. 66. b.

(*b*) 9 Co. 66. b. Cr. Jac. 280, 496. Jenk Cent. 291. 1 Jones 156, 157. Cawly 78. Dy. 168. pl. 17. Hales pl. Co. 47. 2 Brownl. 288.

(*c*) 8 Co. 37. b. 9 Co. 66. a. 2 Brownl. 288. 1 Leon. 143. Br. prescription 98.

(*d*) 1 Rol. 365. 3 Leon 264. Hob. 212. Moor. 580. 2 Jones 145. Cr. Car. 498. Treb. Argument. in quo Warranto 140, 141. 2 Rol. Rep. 48. 1 Roll. 366. 2 Brownl. 287, 288.

33. Pollexfens Argument in quo Warranto 81. Hard. 56, 210. Lane 24. Bridgm.

and offends in ſecret Corners is worthy to forfeit 5 *li.* And it was alſo obſerved, That the Value of an Ounce of Silver ſince 3 *E.* 4. has been raiſed. Alſo *remedium fuit congruum* in Reſpect of the Manner of Puniſhment, *ſcil.* by impoſing a pecuniary Pain, and not a corporal Pain *ſcil'*, Impriſonment; and therewith agrees the ſaid Caſe of *Blackwell-hall*, *Mich'* 32 *&* 33 *Eliz.* and *Trin.* 38 *Eliz. in the Fifth Part of my Reports fo.* 64. *a. Clark's Caſe*, (*a*) A Conſtitution can't be made on Pain of Impriſonment; and the Caſe cited before of *Trin'* 41 *Eliz. inter Waltham* (*b*) *& Auſten*, that a Conſtitution can't be made on Pain of Forfeiture of Goods, therefore it ought to be on a reaſonable pecuniary Pain, or not at all. 2. *Remedium fuit bonæ fidei conſonum*; for the Remedy is to ſuppreſs that which is done *mala fide* and in Deceipt to defraud the ſaid Cuſtom. 3. *Remedium fuit rationi conſonum*; for it is the Rule of Law and Reaſon, *quod* (*c*) *clam delinquens magis punitur quam palam.* 4. *Remedium fuit pro utilitate Civium & aliorum*, 1. *Civium*, for Foreigners are not ſubject to Scot and Lot, *&c.* 2 *Aliorum*, for the Confluence of People from all the Parts of the Realm to *London* produces three great Inconveniences; 1. *Depauperationem*, *ſcil.* impoveriſhing of all the good Towns in *England.* 2. *Depopulationem*, Depopulation of Towns in every Country. 3. *Deſtructionem*, Deſtruction in the End of all Trades and Tradeſmen in every Part of the Realm. 4. *Civium & aliorum*, by the Peſtilence, by Reaſon of the Multitude of People, and peſtring of the Air, whereby it is dangerous, not only to the Subjects, but alſo to the King himſelf, and the great Lords who attend upon his Royal Perſon. 5. *Remedium fuit utile Regi & Populo*; not only for avoiding the Peſtilence as before is ſaid; but alſo, if *London* ſhould daily increaſe, it would be in Time ſo populous, that it would become ungovernable by the Magiſtracy of the City: And as, when the City of *London* (which is *tanqu'* (*d*) *Epitome totius Regni*) is not well governed, all the Parts of the Kingdom find the Inconvenience thereof; ſo when this City is well governed, all the Parts of the Kingdom are kept in better Order, *quod utile eſt Regi & Populo.* Alſo the City would become ſo populous, that it would not be ſubject to ſearch, *&c.* whereby Fraud and Deceit would increaſe in all Wares and vendible Commodities, not only to the Prejudice of the City it ſelf, but alſo of the King and the whole Realm. Secondly, It was objected, That the ſaid Return conſiſts much in Recital, which ought to have been directly and certainly alledg'd. To which it was anſw. and reſol. that this is not on a Demurer in Law, but a Return on a Writ of Privilege, upon which no Iſſue can be tak. or Demur. join. neith. upon our Award herein doth any Writ of Error lie, and theref. the Return

(*a*) 2 Inſt. 54. 1 Rol. 363, 366, 367. Moor 411, 580, 412. 2 Bul. 328. Stiles 85. 1 Rolls 599. 1 Jones 162. Cr. Argument 22. 2 Brownl. 288. Bridg. 141, 142.

(*b*) Antea 125. a. Palm. 5. 2 Inſt. 47. Dyer 279. b. in Marg.

(*c*) 2 Brownl. 288.

(*d*) Poſtea 130. a.

Return is no other, but to inform the Court of the Truth of the Matter, in which such a (*) precise Certainty is not required as in pleading. Thirdly, It was objected, That by the Statutes of 9 *E.* 3. *c.* 1. & 2. 25 *E.* 3. *c.* 2. 27 *E.* 3. *c.* 11. *&c.* it was enacted, That every one might sell any Commodities, or Things saleable in any City, *&c.* in Gross, or by Retail, and that every Statute, Charter, Letters Patents, Proclamations, Usage, Allowance, or Judgment to the contrary are void. To which it was answered and resolved; 1. That the Statutes extend only to Merchants Aliens, and Denizens, which import and export vendible Things, and do not extend to take away the Custom of a City of foreign bought (*a*) and foreign sold, as it was resolved, *ut supra*, *Mich.* 10 & 11 *Eliz. Dyer*, in the Case of the City of *York*; and *vide* the Statute of 2 *R.* 2. *cap.* 1. which restrains the Sale of Wares by Retail, *&c.* by Merchants, Aliens, *&c.* 2. These Statutes do not extend to Tallow-Chandlers, or other such like Artificers, nor to any Manufactures made by them within the Realm. 3. It appears by the Judgment of the whole Parliament, *Anno* (*b*) 7 *H.* 4. *cap.* 9. That notwithstanding all the said Statutes, it was not lawful within the City of *London* (the Charters whereof are established and confirmed by many Parliaments) for any, be he Merchant Alien, Denizen, or other Leige Man whatsoever, who was a Stranger or Foreigner to the Liberty of the City of *London*, *scil'* who was not a Freeman of the said City, to sell any Merchandizes by Retail, *&c.* within the said City: and by the same Act it was ordained and established, That as well the Drapers and Sellers of Cloths, as other Merchants with other Merchandizes, as Wine, Iron, Oyl, Wax, and other Things appertaining to Merchandize, be free, to sell in gross their Merchandize, *scil'* their Cloths, Iron, Oyl, Wax, and other their Merchandizes, as well to any of the King's Subjects as to the Citizens of *London*, notwithstanding any Liberty or Franchise granted to the contrary, which Act had been made in vain, if the City of *London* had been restrained by the said former Acts: But because the said Act did tend to the great Hindrance of the Mayor and Citizens aforesaid, and very like to be the Destruction of the Citizens, and against their Grants and Confirmations, at the next Parliament, *scil'* *Anno* (*c*) 9 *H.* 4. an Act of Parliament not printed was made, (which is to be seen *in Rot' Parliamenti apud Glouc'* 28 *Octobr' anno* 9 *H.* 4.) in these Words following. *Item*, The Commons pray, That as by diverse Kings of *England*, your Progenitors and Predecessors, our Sovereign Lords, by their Chart. confirmed by you by Authority of Parl. amongst other Franchises and Liberties to the

(*) 2 Rolls Rep. 158.

(*a*) Antea 125. a. 2 Brownl. 287. Dy. 279. pl. 10. Moor 582. 2 Rol. 597. 1 Sand. 312. Cr. El. 110.

(*b*) 4 Inst. 249.

(*c*) 4 Inst. 249. Cotton Records 466.

the Mayor and Citizens of *London*, and their Succeſſors, it was granted, That no Merchant Eſtranger to the Liberty of the ſaid City ſhould ſell any Merchandizes within the Liberty of the ſaid City to other Merchant Stranger, nor ſuch Merchant Stranger ſhould buy of other Merchant Stranger any Merchandizes, under Forfeiture of the ſaid Merchandizes: which Franchiſes and Liberties the ſaid Mayor and Citizens of *London* which now are, and their Predeceſſors, by Authority of the ſaid Grants and Confirmations have had and enjoyed ever ſince 'till at your laſt Parliament holden at *Weſtminſter*, in the which by Authority of the ſame Parliament the ſaid Article of their ſaid Lib. was revok'd and annull'd by Statute, So that as well Drapers and Sellers of Cloth, as other Merchants, with their divers Merchandizes, as Wine, Iron, Oil and Wax, and other Things belonging to Merchandizes, are free to ſell, in groſs their Cloths and other their Merchandizes aforeſa. as well to any the King's Liege People, as to the ſaid Citizens of *London*, notwithſtanding any Franchiſe or Liberty granted to the contrary, to the great Prejudice of the Ma. and Citizens aforeſaid, and the likely Deſtruction of the ſaid Citizens againſt the Grants and Confirmations aforeſaid: That it would pleaſe you our Sovereign Lord, with the Aſſent of the Lords Spiritual and Temporal in this Parliament, to repeal and annull the ſaid Statute in your ſaid laſt Parliament touching that Article: So that the ſaid Mayor and Citizens and their Succeſſors, be entirely reſtored to their ſaid Liberties and Franchiſes by Statute: So that from henceforward no Merchant being a Stranger to the Liberty of the ſaid City ſell any Merchandizes within the Liberty of the ſaid City to other Merchant Stranger; nor that ſuch Merchant Stranger buy of other Merchant Stranger any ſuch Merchandizes within the Liberty of the ſaid City under Forfeiture thereof. Saving and reſerving to all Lords, Knights, Eſquires, and all other Liege Denizens of our Sovereign Lord the King, Power at their Will to buy within the Liberty of the ſaid City of any Merchant Stranger, Merchandizes in groſs to their own Uſe, ſo that they do not ſell them again to any other. The King wills, That the Citizens of *London* have their Liberties and Franchiſes touching this Article, as entirely as they had before the laſt Parliament held at *Weſtminſter*, the Statute made at the ſaid Parliament notwithſtanding. *Nota*, Reader, this Act is not only a good Expoſition and Explanation of the former Statutes touching

touching this Matter; but also a good Demonstration of the Custom and Liberty of the City of *London* in these Points. In *London* a Citizen and Freeman may, by their Custom, devise in a (*a*) Mortmain, notwithstanding the Statute of Mortmain be to the contrary; and so in other like Cases, *Vide* 8 *H.* 7. 4. *b.* 9 *H.* 6. 58. 7 *H.* 6. 1. *a.* 45 *E.* 3. 26. *b.* 28 *Ass.* 25. 5 *H.* 7. 10. *a.* 11 *H.* 7. 21. *a.* 23 *Eliz. Dyer* 373. for all the Customs of *London* are established and confirmed by Act of Parliament, as appears by this Retorn. And it was observed, That in the Case at Bar, in the said Retorn there are five general Parts; 1. The Custom. 2. The general Act to enable and preserve this Custom, which was before all the said Statutes. 3. A particular Charter, *Anno* 15 *Ed.* 3. which of itself was not sufficient, and therefore it was confirm'd and established by Act of Parliament. 4. Former Precedents of Constitu. in the like Cases, *viz.* in 3 *E.* 4. & 17 *H.* 8. 5. The Constitution upon which the Action was brought in *London*. But the Court took Advisement upon one Part of the Retorn, by which it is averred *Quod* Jacobus Wagoner *usus est manuali occupatione de Tallow Chandler*, and doth not shew that he sold any Candles, *&c.* for if he made them for his own Use, (*b*) without selling any for Lucre or Gain, he might well do it, as every one may Bake or Brew, *&c.* for his own Use, without selling Bread or Beer: But it seems that is implied by the said Averment, that it is his Trade, by which he lives by Sale of his Commodities of his Trade, and not only to make them for his own Use, for it is not properly said, that one uses a manual Occupation; when he makes no more than for himself, as he who Brews or Bakes for his own Use, it is not properly said, that he uses the manual Occupation of a Brewer or Baker, and that appears by the Statute of 5 *Eliz. cap.* 4. (*c*) for there it is enacted, *That every Person being an Housholder and four and twenty Years Old*, &c. *and using and exercising any Art, Mystery, or manual Occupation, shall*, &c. *have and retain*, &c. *an Apprentice*, &c. But without Question, he who uses the making of any Manufacture for his own Use, as making of Candles, *&c.* can't retain any Apprentice within the Statute of 5 *Eliz.* So in another Part of the Act it is enacted, *That it shall not be lawful to any Person or Persons*, &c. *to set up, occupy, use or exercise any Craft, Mystery, or manual Occupation, except he shall have been brought up therein seven Years at the least, as an Apprentice*, &c. And yet he who Bakes, Brews, makes Candles, *&c.* for his own Use, is not said in Law to use any manual Occupation: And upon this Branch, and much to this Purpose, a Judgment was given in the Court of Exchequer, and afterwards affirmed in a Writ of Error in the Exchequer-chamber, *Mich.*

(*a*) 2 Bulstr. 189. 1 Rolls 556. Dyer 255. pl. 3. 373. b. pl. 13. Br. Custom. 41. 7. Br. Devise 51. 22. 5 H. 7. 19. b. 7 H. 6. 1. a. 28 Ass. 24.

(*b*) Bridg. 140. 141. 11 Co. 54. a. Hob. 211, 183. Moor 886. Cr. Car. 499. Jenk. Cent. 284. 13 Co. 12. Palm. 544. Lit. Rep. 251.

(*c*) 11 Co. 54. a. Moor 869. Godb. 253. Hard. 56. Cart. 119. Palm. 396. Hob. 183, 211. 2 Rolls Rep. 391. 1 Sid. 303. 2 Keb. 125. 2 Bulstr. 186. 1 Rolls Rep. 10. Calthorp. 9. 3 Bulstr. 179. Styles 223, 383, 479. Cr. Jac. 85. 179. Ct. El. 737. Cr. Car. 316, 347, 499, 516. 2 Rolls 579. 1 Jones 412. Noy. 5. Hurt. 99, 132. 5 Co. 63. b.

6 Jacobi, and the Caſe, worthy to be known, was ſuch. *Taylor* did inform in the Exchequer, on the Stat. of 5 *Eliz. c.* 4. *tam pro Dom' Rege, quam pro ſeipſo*, againſt (*a*) *Shoile*, that he had exerciſed the Art and Myſtery of a Brewer, *&c.* for divers Months, aga. the ſaid Act, and * averred, that the Defendant did not uſe or exerciſe the Art or Myſtery of a Brewer at the Time of the making of the ſaid Act, nor had been an Apprentice for ſeven Years at the leaſt, in the Art and Myſtery of a Brewer, according to the ſaid Act, *&c.* The Defendant demurr'd in Law upon the Information, and Judgment was given againſt him by the Barons of the Exchequer, on which Judgment a Writ of Error was brought in the Exchequer-Chamber, and *Mich. 6 Jacobi Regis*, the Matter was argued by Counſel on both Sides; and two Errors were aſſigned, one, that a Brewer is not within the ſaid Branch of the ſaid Act, on which the Information is conceived, for the Words are, *That it ſhall not be lawful to any Perſon or Perſons, other than ſuch as now do lawfully uſe or exerciſe any Art, Myſtery, or manual Occupation, to ſet up, uſe or exerciſe any Art, Myſtery or Occupation, except he ſhall have been brought up therein ſeven Years at the leaſt as an Apprentice:* And it was ſaid, that the Trade of a Brewer is not any Art, Myſtery, or manual Occupation within the ſaid Branch, becauſe it is eaſily and preſently learned, and need not have ſeven Years Apprenticeſhip to be inſtructed in it, for every Houſewife in the Country can brew; and the Stat. of (*b*) 22 *H.* 8. *cap.* 13. declares, that a Brewer is not an Handicraft Artificer. The other Error was, That the ſaid Averment was not ſufficient, for the (*c*) Averment ought to be as general as the Exception in the Statute is, *ſc.* That the Defend. did not uſe any Art, Myſtery or Occupat. at the Time of the making of the Act; for by their Pretence, if he exerciſed any Art, Myſtery, or manual Occupation then, as a Taylor, Carpenter, *&c.* he might now uſe any oth. Art, Myſtery, or manual Occupa. whatſoever. As to the firſt, it was reſolved, That the Art of a (*d*) Brewer, *ſc.* to keep a common Brew-houſe to ſell Beer to any other, is an Art, Myſtery, and manual Occupation within the ſaid Branch of the Act; for in the Beginning of the Act it is enacted, *That no Perſon ſhall retain for leſs Time than a whole Year in any of the Sciences, Crafts, Myſteries, or Arts of Clothing*, &c. *Bakers, Brewers*, &c. *Cooks*, &c. So that by the Judgment of that very Parliament, the Trade of a Brewer is an Art and Myſtery: Which Words are in the ſaid Branch upon which the ſaid Information is grounded. And it was reſolved, That he who brews or bakes, *&c.* for his own (*e*) Uſe, doth not uſe or exerciſe any Art, Myſtery, or manual Occupation againſt the ſaid Act, for the ſaid Words imply, that he ſo

(*a*) Cr. Jac. 178, 179. Jenk. Cent. 284. 13 Co. 11, 12. Shoile's Caſe. M. 6. Jac. * Salk. 611. Palm. 393.

(*b*) 13 Co. 12.

(*c*) 13 Co. 12.

(*d*) Palm. 542. Cr. Jac. 178. 13 Co. 12. Hetl. 102. 2 Bulſtr. 189, 190. Jenk. Cent. 284.

(*e*) Lit. Rep. 251. 11 Co. 54. a. Bridg. 140, 141. 11 Co. 54. a. Hob. 183, 211. Moor 886. Cr. Car. 499. Jenk. Cent. 284. 13 Co. 12. Palm. 544.

ſo uſe or exerciſe the Art, Myſtery, or manual Occupation, that by Sale of the Commodities of his Occupation he get his living, but to ſay, that it is not any Art, Myſtery, or manual Occupation, becauſe every Houſewife brews for her (*a*) private Uſe, ſo likewiſe ſhe bakes and dreſſes Meat, *&c.* and yet none can keep a common Bake-houſe, or Cook's-ſhop to ſell to others, unleſs he has been an Apprentice, *&c.* according to the ſaid Act, for they are expreſly named alſo in the Act, as Arts and Myſteries: And the Act of 22 *H.* 8. explains, That a Brewer, Baker, Chirurgion, (*b*) or Scrivenor alien, are no Handicraftſmen within the Purview and Intention of certain Penal Laws, but that doth not prove that they are not Arts or Myſteries; for Art or Myſtery is more general than Handicraft, for that is reſtrain'd to Manufactures, but not within the Penalty of the ſaid Statutes, and it is no Queſtion, that in Truth they all are Arts, Myſteries, or manual Occupations. As to the ſecond it was reſolved, That (*c*) the Intent of the Act was, That none ſhould take upon him any Art, Myſtery, or manual Occupation, but ſuch in which he had Knowledge: And therefore the Statute intended, That he who uſed any Art, Myſtery, or manual Occupation at the Time of the ſaid Act, might uſe the ſame Art or Myſtery; for (*d*) *quod quiſque norit in hoc ſe exerceat*; and the Words of the ſaid Branch are, *as now do lawfully uſe*, &c. And it was ſaid, That it was very (*e*) neceſſary that Brewers ſhould have Skill and Knowledge in brewing good and wholſome Beer, for that doth much conduce to Mens Health. And ſo the firſt Judgment was affirmed. And in this Caſe at the Bar, as well by the Serjeants, as by the Juſtices in their Arguments, much was ſaid of the Antiquity of the City of *London*. *Ammianus Marcellinus*, who Wrote about 1200 Years paſt, ſaith, That then it was (*f*) *Oppidum vetuſtum*. *Cornelius Tacitus*, (who married the Daughter of *Cneius Lucius Agricola*, and who was in this Kingdom with *Agricola* ſeven Years) ſaith, *Quod* Londinum *tempore Neronis* (which is above 1500 Years ago) was (*g*) *Copia negotiatorum & commeatu maxime celebre*. And omitting all that (*h*) *Stephanides* (who Wrote in the Reign of *H.* 2.) has ſaid of the Honour and Antiquity of this City, I ſay, *Quod hæc eſt Camera Regis, Cor Reipublicæ, & tanquam* (*i*) *Epitome totius regni*.

(*a*) Lit. Rep. 251. Cro. Jac. 178. Cro. Car. 499. 11 Co. 54. a. 13 Co. 12. Bridgm. 140, 141. Hob. 183, 211. Moor 886. Jenk. Cent. 284. Palm. 544.

(*b*) 13 Co. 12.

(*c*) 13 Co. 12.

(*d*) Co. Lit. 125. a. 9 Co. 13. a. 12 Co. 66.

(*e*) 13 Co. 12.

(*f*) 4 Inſt. 247. 2 Brownl. 286.

(*g*) 4 Inſt. 247. 2 Brownl. 286.

(*h*) 4 Inſt. 247.

(*i*) Antea 127. b.

Paſchæ 7 Jacobi Regis.

The Caſe of THETFORD SCHOOL, &c.

Popham 6, 7. Moor 594. Cr. El. 288. Duke ſur Charitable Uſes 78, 79. 80.

UPON a private Bill exhibited in the Parliament for Erection of a Free-School, Maintenance of a Preacher, and of four poor People, *ſcil.* two poor Men, and two poor Women, according to the Will of Sir *Thomas Fulmerſtone*, Knight, a Queſtion was moved by the Lords, and was ſuch, Land of the Value of 35 *l.* *Annº 9 Eliz. Regina*, was deviſed by Will in Writing to certain Perſons and their Heirs, for the Maintenance of a Preacher four Days in the Year, of a Maſter and Uſher of a Free Grammar-School, and of certain poor People; and a ſpecial Diſtribution was made by the Teſtator himſelf, in the ſame Will, amongſt them, of the Revenues, *ſc.* To the Preacher a certain Sum, and certain Sums to the School-maſter and Uſher, and to the poor People, amounting in the whole to 35 *l.* *per Annum*, which was the yearly Profit of the Land at that Time; and afterwards the Lands became of greater Value, *viz.* of the Value of 100 *l.* *per Annum*. Now two Queſtions were moved, 1. Whether the Preacher, School-Maſter, Uſher and Poor, ſhould have only the ſaid certain Sums appointed to them by the Founder, or that the Revenue and Profit of the Land ſhould be imploy'd to the Increaſe of the Stipend of the Preacher, School-Maſt. Uſher and Poor? 2. If any Surpluſage remain'd,

remain'd, How it should be imploy'd? And it was resolv'd, on hearing of Counsel learned on both Parts, several Days at *Serjeants-Inn*, by the two Chief Justices, and *Walmsley* Justice (to whom the Lords referred the Consideration of the Case) That the Revenue and Profit of the said Land should be employed to the Encrease of the Stipend of the Preacher, School-Master, *&c.* and Poor, and if any Surplusage remain'd, it should be expended for the Maintenance of a greater (*a*) Number of Poor, *&c.* and noth. should be converted by the Devisees to their own Uses. So in the Case in Question, Where Lands in *Croxton*, in the County of *Norfolk*, were devised by Sir *Richard Fulmerstone*, to his Executors, to find the said Works of Piety and Charity, with such certain Distribution as is aforesaid; and now the Value of the Manor was greatly encreased, that it shall be imployed in Performance and Increase of the said Works of Piety and Charity instituted and erected by the Founder. For it appears by his Distribution of the Profits, that he intended the whole should be imployed in Works of Piety and Charity, and nothing should be converted to the private Use of the Executors, or their Heirs. And this Resolution is grounded on evident and apparent Reason; for, as if the Lands had decreased in Value, the Preacher, School-Master, *&c.* and poor People should lose, so when the Lands increase in Value, *pari ratione* they shall gain. And they said, That this Case concern'd the Colleges in the Universities of *Cambridge* and *Oxford*, and other Colleges, *&c.* For in antient Time, when Lands were of small yearly Value (Victuals then being cheap) and were given for the Maintenance of poor Scholars, *&c.* and that every Scholar, *&c.* should have 1 *d.* or 1 *d. ob.* a Day, that then such small Allowance was competent in respect of the Price of Victuals, and the yearly Value of the Land; and now the Price of Victuals being encrea. and with them the annual Val. of the Lands, it would be now Injurious to allow a poor Scholar 1 *d.* or 1 *d. ob.* a Day, which can't keep him, and to convert the Residue to private Uses, where in right the whole ought to be imployed to the Maintenance or Increase (if it may be) of such Works of Piety and Charity which the Founder has expressed, and nothing to any pri. Use; for every College is seised *in jure Collegii, scilicet*, to the Intent that the Members of the College, according to the Intent of the Founder, should take the Benefit, and that nothing should be converted to private Uses. *Panis e-*

(*a*) 10 Co. 30. b.

(d) Duke fur Charitables Uſes 72. Hern fur charitable Uſes 80. Co. Lit. 348. a. 4. Co. 106. a.

gentium (a) vita pauperum, & qui defraudat eos hanc ſanguinis eſt. And afterwards, upon Conference had with the other Juſtices, they were of the ſame Opinion: and according to their Opinions the Bill paſſed in both Houſes of Parliament, and afterwards was confirmed by the King's Royal Aſſent. Note, Reader, there is a good Rule in the Act of Parliament called, *Statutum Templariorum: Ita ſemper quod pia & celeberrima voluntas Donatorum in omnibus teneatur & expleatur, & perpetuo ſanctiſſime perſeveret.*

Paſcha

Paſchæ 8 Jacobi Regis.

In Communi Banco.

TURNOR's *Caſe.*

TErmino *Michaelis anno 6 Jacobi Rot'* 1811. *Edward Tur-* Bridgm. &c.
nor, Gent' Executor of *E. Turnor* brought an Action of Debt againſt *Ed. Lawrence* and others, Adminiſtrators of *Richard Booker*, on a Bond of 100 *li.* made by the ſaid *Rich. Booker* to *E. Turnor* the Teſtator: the Defendants pleaded in Barr a former Judgment in the King's Bench upon ſeveral Bills, which amounted to 60 *li.* &c. *Et ulterius dic' quod alias ſcilicet ad Curiam Domini Regis tent' apud Civitatem* Ciceſtr' *in* Guildhalda *Civit' præd' coram* Roberto Adams *tunc Majore dictæ Civit' die Lunæ, videlicet* 23 *die* Febr' *anno Regni ipſius Dom' Regis quarto,* Thomas Billet *querebatur verſus ipſos* Edw' *& alios Defendentes Adminiſtratores dicti* Richardi Booker *de placito quod iidem* Edward', &c. *redderent ei centum libras quas ei adtunc injuſte detinuerunt, ſuper quo ad eandem Curiam iidem* Edw' Lawrence, *&c. Solemniter exacti fuerunt, & per* Leonard Smith *Attorn' ſuum comperuerunt & tunc dixerunt quod ipſi non potuerunt dedicere Actionem præd'* Thomæ Billet *præd', nec quin Scriptum obligator' virtute cuj' idem* Thomas Billet *debitum præd' de eiſdem* Edwardo, *&c. exigebat, fuit Factum præd'* Rich' Booker, *nec quin præd'* Richard' Booker *in vita ſua debuit præd'* Thomæ Billet *præd' debitum centum librarum, modo & forma prout præd'* Thomas Billet *adtunc verſus eos querebatur:* whereupon Judgment was given in the ſame Court for the ſaid *Tho Billet:* and pleaded another Judgment for 60 *li.* in the ſame Court at the Suit of *John Githens:* and pleaded divers other former Recoveries in Actions of Debt in the ſame Court againſt the ſame Adminiſtrators,

miniſtrators, amounting in the whole to 514 *li.* 8 *d.* and that they have not Goods or Chattels of the Inteſtate in their Hands to be adminiſter'd, *præterquam Bona & Catalla quæ (a) non attingunt ad valentiam pd'* 514 *li.* 8 *d. verſus ipſos in forma præd' recuperat'* which are chargeable and liable to the ſaid ſeveral Executions. The Plaintiff replied and ſaid, That the ſaid Recov. of the ſaid *John Githens* (b) *habita fuit per Fraudem & Covinam, &c. ad ipſum Edw. Turner de debito ſuo præd' defraudand' & decipiend'* upon which they were at Iſſue to be tried by the Country: And as to the ſaid Recovery of the ſaid 100 *l.* againſt the Defen. that the Def. after the Death of the ſaid *Rich. Booker*, and after the ſaid Recovery, and before the Purchaſe of the ſaid original Writ, 24 *Feb. Anno* 4. *Reg' nunc*, have paid to the ſaid *Tho. Billet* 60 *li.* Parcel of the ſaid 100 *li.* recovered by him as is aforeſaid, in full Satisfaction and Diſcharge of the ſaid Judgment, with which Payment the ſaid *Thomas Billet* held, and yet holds himſelf contented and ſatisfy'd, and then and there offered, and yet offers to releaſe the ſaid *Ed. Lawrence*, &c. the ſaid 100 *li.* or to acknowledge Satisfaction thereof in the ſaid Court of our Lord the King at *Chicheſter*, at the Charges of the ſaid Adminiſtrators: But the ſaid *Edward, &c.* deceitfully, and to the Intent to (c) defraud and deceive the ſaid *Ed. Turnor Executorem de juſto debito ſuo, Cognitionem Satisfactionis de præd' centum libris, &c. Sive de judicio præd' relaxari, &c. diſtulerunt & adhuc differunt & Judicium præd' inde in ſuo robore & vigore permanere ſinunt ad Intentionem prædictam.* And made the like Replicat. to the other Recoveries: whereup. the Def. demurr'd in Law; And the Point in Law was, When a Judgment is given againſt an Adminiſtrator or Executor, for a juſt Debt. due by the Inteſtate or Teſta. if the ſaid ſubſequent Agreem as is before alledg'd ſhall avail the Plaintiff or not? And it was objected, That foraſmuch as the Judgment was obtained *bona fide* for a juſt and true Debt, the ſubſequent Agreement can't make the Recovery covenous,. and ſo long as it remains in Force, unleſs the Executors have Goods and Chattels in their Hands above that Judgment, they are not bound by Law to pay any other Debt, and Covin can't be alledged in doing of a lawful Act; As in a Writ of Dower (d) againſt a Diſſeiſor, if the Tenant pleads in Abatement of the Writ an Entry by the Diſſeiſee, the Demandant ſhall not be receiv'd to averr the Entry to be by Covin to abate his Writ, becauſe the Entry is congeable and lawful, and mixt with no Wrong, as it is held in 15 *E.* 4. 4. *b.* but if a Woman has lawful Title (e) of Dower, and cauſes another to diſſeiſe the Tenant, againſt whom ſhe recovers upon a good Title, it ſhall not bind the Diſſeiſee, as

(a) Vaugh. 104. Bridgm. 80. 9 Co. 108. b.

(b) Bridgm. 80.

(c) 3 Keb. 577. 1 Rolls Rep. 504. Latch. 111. 9 Co. 109. a. 1 Jones 92.

(d) Plow. 43. b. 44. a. 48. a. Br. colluſion 20.

(e) Plowd. 51. a. Fitz. Dower 42. Br. Dower 15. Br. fauxifier de Recovery 6. Br. colluſion 10. Plowd. 54. b. 3 Co. 78. a.

5 Co. 31 a. 11 E. 4. 2. a. 6 Co. 58. a. 44 E. 3. 45. b. 46. a. Co. Lit. 35. a. 357. b. 1 Siderf. 21. Lanf. 41. 1 Rol. 549. 2 Rol. Rep. 17. Perk. Sect. 396. 44 Aſſ. 2. 18 H. 8. 5. a.

as it is held in 44 *E.* 3. 45. *b.* The ſame Law of him who is put to his *Formedon*, or any other real Action; and the Rea. is, becauſe the Demandant's Right is mix'd by Covin with a Tort, whi. is an ill Herb, and makes the whole Act tortious. *Vide* 25 *Aſſ. p.* 1. 22 *Aſſ. p.* 92. 27 *Aſſ. p.* 74. 41 *Aſſ. p.* 28. 44 *Aſſ. p.* 29. 11 *H.* 4. 60, 61. 15 *E.* 4. 4 *b.* 11 *E.* 4. 2. 7 *H.* 7. 11. 1 *H.* 8. 5. 19 *H.* 8. 13. But it was anſwered and reſolved, and ſo adjudged, That the Plaintiff ſhould (*a*) recover; For an Exe. or Admini. ought to exe. his Office, and admin. the Goods of the decea. (*b*) lawfu. truly, and diligently: Lawfully, in paying of all Duties, Debts and Legacies, in ſuch Precedency and Order as they ought to be paid by the Law: Truly, to (*c*) convert noth. to his own Uſe; for an Exec. or Admi. hath not the Deceaſed's Goods to his own Uſe, but in ano. (*d*) Right, and to ano. Uſe, and ought not, by any Pra. or Device, to barr or hin. any Credi. of his Debt, but ought truly to exe. his Office accord. to the Truſt which is repo. in him: Diligently, *quia* (*e*) *negligentia ſemper habet Comitem infortunium.* Then in the Caſe at Barr, when the Admi. compound with one who has a Judgment of 100 *l.* for 60 *li.* and the Plaint. offers to (*f*) rele. or to ackno. Satis. and they deferr it to the Intent that the Judgm. may ſtand in Force, by which the Plaint. will be defrau. of his true Debt, and the Admini. convert the Deceaſed's Goods to their pri. Uſe, wh. is alto. aga. their Of. and the Truſt repo. in them; And theref. be ſuch Agreem. eith. precedent bef. the Reco. or ſubſe. aft. the Reco. it's all one as to the Cred. who is a third Perſon, for he is defrau. as well by the ſubſe. Agreem. as by the Agreem. precedent, and thereby the Admini. aga. their Offi. and the Truſt repo. in them, wou'd make a priv. Gain, where they ought not, and the Cred. who is a Stran. wou'd loſe his Debt, whi. is by the Law due to him: And an Agreem betw. two ſhall not hurt or preju. a third Per. And (*g*) *Goodale's Caſe, in the 5th Part of my Reports fo.* 95. was cited and well applied to this Caſe. And if any Prejudice accrues to the Admini. in this Caſe, it is their own Fault, for *Billet* the Plaint. would ha. releaſed to them or acknow. Satis. but they deferred it, to the End by this Means to barr the Plaint. of his juſt and true Debt. 2. It was reſol. That the Barr as to all the Reco. pleaded in the Court of *Chicheſter* was inſufficient, for the Validity of the ſaid Reco. was all the Life and Force of the Barr: and, 1. It doth not ap. that the Mayor had Juriſd. or Power (*b*) to hold a Court, eith. by Preſcrip. or Patent. 2. It ap. by the Decla. in the ſaid Court, that the Action of Debt was bro. for 100 *l.* without making Mention of any Bond, and therefore it ought not to be intended, that there was any Bond, and then the ſaid Adminiſtra. were not chargeable in an Action of Debt with a ſimple (*i*) Contract,

(*a*) Bridgm. 80.
(*b*) 5 Co. 27. b.
(*c*) Cart. 127.
(*d*) Cart. 134.
(*e*) 3 Bulſtr. 110.
(*f*) 1 Jones 91, 92.
(*g*) Popk. 98. 100. Cr. El. 383, 384. Jenk. Cent. 261. Goldsb. 176, 177. Co. Lit. 209. b. Moor 708, 709. 1 Roll. 421. Hob. 72.
(*b*) Vaugh. 93, 94. 1 Jones 451. Cro. El. 489. Cro. Jac. 184, 493, 532. Cro. Car. 46. Yelv. 46.
(*i*) Antea 126. a. and Hard. 303. Yelv. 20. Vaugh. 93,

94, 95. 5 Co. 82. b. 9 Co. 86. b, 87. a, Cro. El. 121, 409. Noy 53. Poph. 32. Swinb. 328, 329. 1 And. 182, 183. 1 Leon. 165. Mo. 366. 1 Sid. 333. Goldsb. 106, 107.

and altho' the Defen. in his Barr doth confeſs that the Debt was due by Bond, yet that will not make the Declaration good: For when the Declarat. wants (*a*) Circumſtance of Time, or Place, *&c.* it may be made good by the Barr: But when a Declarat. Bar or Replicat. *&c.* wants (*b*) Subſtance, it can't be made good by the other's Plea. And ſo you will better underſtand your Books in 18 *E.* 4. 16. *b.* 22 *E.* 4. 2. *b.* 6 *E.* 4. 2. 11 *H.* 7. 24. 6 *H.* 7. 6, 10. 5 *H.* 7. 12. 38 *H.* 6. 17, 18, 19. 18 *E.* 3. 30. 38 *E.* 3. 34. *b.* *Plow. Com.* 229. *Vide F. N. B.* 21. 3. It was reſolved, That in the Caſe at Bar, if the (*c*) Replication had been inſufficient, *ſc.* that the ſaid Agreement ſubſequent ſhould not avail the Plaintiff; yet upon the whole Record the Plaint. ſhould have Judgm. becauſe the Barr was inſufficient in Matter: And a Difference was taken, when by the Replicat. it appears that the Plaint. has no Cauſe of Action, there the Plaint. ſhall never have Judgm. altho' the Barr be inſufficient; as in Debt on a Bond, with Condition to perform (*d*) Covenants in an Indent. the Defen. pleads Performance of all the Covenants generally, where it appears that divers of them are in the Negative or Diſjunctive, and ſo the Plea in the general Affirmative is inſufficient; yet if the Plaint. replies, and ſhews a Breach of one of the Covenants, which on his own ſhewing is no Breach, upon which the Defend. demurs, Judgm. ſhall be given againſt the Plaintiff, becauſe upon the whole (*e*) Record it appears that the Plaint. has no Cauſe of Action; for the Bond is endorſed with Condit. to perform the Covenants, ſo that the Plaint. has no Cauſe of Action 'till there be a Breach of Covenant, and on the Plaintiff's own ſhewing there is not any Breach, which is ſufficient in Law to give the Plaintiff Cauſe of Action; and it ſhall be always intended, that every Man will ſhew the beſt of his Caſe: But when the Defendant's (*f*) Barr is inſufficient in Subſtance, and the Plaint. replies, and ſhews the Truth of his Caſe, whereby he ſhews no Matter againſt himſelf, but Matter explanatory, or perhaps not material, there the Court ſhall adjudge upon the whole Record, and (the Declaration being good) for the inſufficiency of the Barr, without any regard to the Replication, Judgment ſhall be given for the Plaintiff: As if a Man pleads a Grant by Letters Patents in Barr, which are not ſufficient, the Plaint. by Replicat. ſhews another Clauſe in the ſaid Let. Pat. which Clauſe is not material, and the Defendant demurs in Law, in this Caſe Judgment ſhall be given againſt the Defendant, *& ſic in ſimilib'*. And ſo you will better underſtand your Books in 7 *E.* 4. 28. *Tilly* (*g*) and *Woody*'s Caſe, 11 *H.* 7. 28. and the Books aforeſaid; and other Books vouched in Dr. *Bonham*'s Caſe.

(*a*) Co. Lit. 303. b. Doct. pla. 69. 7 Co. 25. a.

(*b*) Cro. Car. 209. Co. Lit. 303. b. Doct. pla. 69. 7 Co. 25. a.

(*c*) Cr. Jac. 221, 333. Cro. Car. 6. Doct. pla. 70, 325. Lit. Rep. 130, 172. Mo. 464. 2 Sid. 336. Dyer 39. pl. 62. Antea 120. b. 9 Co. 53. a. 110. b. Godb. 138. Hob. 14. Yelv. 152, 153. Palm. 287. Winch. 37.

(*d*) Cro. El. 232. Cro. Jac. 560. Cro. Car. 422. Co. Lit. 303. b. 2 Roll. Rep. 159. Hob. 14.

(*e*) Poſtea 163. a. 3 Co. 52. b. 1 Sand. 285. Hob. 199. Cro. Jac. 123, 221, 312. Hard. 32. 2 Bulſtr. 94. Styl. 354. Palm. 287. Lit. Rep. 172.

(*f*) Cro. Jac. 233. Cro. Car. 5. Pop. 42. Antea 120. b. 9 Co. 110. b. Doct. pla. 70, 325. Lit. Rep. 341. Godb. 238. Palm. 287. Winch. 37.

(*g*) Hob. 14. Plowd. 66. b. 7 Ed. 4. 31. 2. b. Fitz. Judgment 50. Moor 105. Dyer 119. pl. 6. 1 And. 168.

Paſcha

Paſchæ 8 Jacobi Regis.

MARY SHIPLEY's *Caſe.*

TRinit. 4 *Jacobi rot.* 28. in the *King's Bench*, *Mary Shipley* brought an Action of Debt on a Bond of 200 *l.* againſt *Chriſtopher Beane* and *Ann* his Wife, Executrix of *Francis Haſilwood* the Obligor; the Defendants pleaded fully adminiſtred, and ſo nothing in their Hands. The Plaintiff replied, that they had Aſſets. The Jurors found Aſſets to the Value of 172 *l.* and Judgment was given to recover the (*a*) whole Debt of 200 *l.* and Damages and Coſts of the Goods of the Teſtator, *Si, &c.* (*b*) *& ſi non, tunc* the Damages of their own proper Goods. Upon a Writ of *Error* brought upon the ſame Judgment in the Exchequer Chamber, the ſaid Judgment was affirmed *Hill.* 7 *Jac.* For upon the Bar, the Effect of which is, nothing in their Hands, the Plaintiff might have prayed her Judgment (*c*) preſently; for thereby he confeſſes the Debt, but that he cannot have Execution till the Defendants have Goods of the Deceaſed: as in a Writ of (*d*) Meſne, if the Defendant pleads, not diſtreined in his Default, he may pray Judgment preſently, for this Plea will ſerve him only to ſave him from Damages. *Vid.* 11 *H.* 4. 52. *a.* So in a (*e*) *Warrantia Chartæ* aga. the Heir, the Defend. pleads nothing by Deſcent, *&c.* the Plaint. ſhall thereupon recover *pro loco & tempore.* So in Debt againſt (*f*) the Heir, if he pleads noth. by Def. the Plaint. may have Judgm. preſ. and a *ſcire facias* when

(*a*) Allen 37, 38. Styles 88. 1 Vent. 94. 9 H. 7. 15. 2. Raſt. Ent. 328. b. Cro. Eliz. 592. Cr. Car. 167, 373. 1 Roll. 929. 1 Leon 68.

(*b*) Cro. Jac. 647, 648. Palm. 314. Dyer, 185. pl. 67. 1 Roll. 928, 932. Noy 120. 2 E. 4. 4. 2. 7 E. 4. 9. 2. Kelw. 61. 2. 11 H. 4. 5. 2. Br. Exec. 51. Fitz. Judgment 68.

(*c*) Hob. 199. 1 Sid. 448. 1 Sand. 226. Office Exec. 274. Co. Lit. 366. 2. Moor 246. Swinb. 329. Cr. El. 592, 887. 1 Vent. 94, 95, 96.

(*d*) Co. Lit. 100. 2. Hob. 39, 217. Br. Meſne 5. Fitz. Meſne. 23. (*e*) F. N. B. 134. K. 1 Vent. 94. Noy. 149. Hob. 39, 199, 217. Co. Lit 366. 2. (*f*) Vent. 95, 96. Dyer 373. pl. 14.

when Assets descend. *Vide Vet' N. B. in Warrantia Chartæ &* 21 (a) *E.* 3. 9. *b. Br. tit. Warrantia Chartæ* 30. But the Tryal in the Case at Barr is a good Direction to the Sheriff what he is to do; but yet that doth not alter the Judgment of the Law; and it is the better Form, and more agreeable to Law to have Judgment for the whole, than for Part of the Debt, according to (b) the Assets found. *Vide Syms* Case before for this Matter.

(a) Antea 52. b. Plowd. 440. a. b.

(b) Co. Lit. 166. b. Antea 51, 54.

Pasch.

Paſchæ 8 Jacobi Regis.
In Communi Banco.

Sir JOHN NEDHAM's *Caſe.*

ARthur *Poſt* and *Katherine* his Wife Adminiſtratrix of *Eliz. Weldiſh*, brought an Action of Debt againſt Sir *John Nedham* (which Plea began *Mich.* 7. *Jacobi*, *rot.* 332) on Bond of 200 *l.* made to the ſaid *Eliz. Cui quidem Kath' adminiſtratio omnium & ſingulorum bonorum, &c. quæ fuer' præfat' Eliz. tempore Mortis ſuæ per Willibel' permiſſione divina Roffens' Epiſcopum apud Roffen poſt Mortem præd' Eliz. commiſſa fuit* 5 *Febr'* 1605. The Defendant pleaded, *quod poſt Mortem dictæ Eliz. & ante Commiſſionem Adminiſtrationis præd' ſcilicet*, 13 *Maii* 1604. The Dean and Chapter of *Canterbury* being Guardians of the Spiritualties (*a*) *ſede vacante* of the Archbiſhop of *Canterbury*, committed Adminiſtration of the Goods, *&c.* of the ſaid *Eliz.* to the Defendant, *eo quod eadem Eliz. tempore Mortis ſuæ habuit bona notabilia in divers' Dioces' Provincia Cant'*, which Adminiſtration committed by the ſaid Dean, *&c.* doth yet remain in Force, and demanded Judgment of the Action. The Plaintiff replied, That after the ſaid Adminiſtration granted by the ſaid Dean, *&c.* to the Defendant, and before the Purchaſe of this original Writ, *ſcil.* 4 *No.* 1607 before Dr. *Bennet* Commiſſary of the Prerogative Court of *Canterbury*, at the Suit of the ſaid *Katherine* againſt the ſaid Defendant, the Adminiſtration granted to the Defend. was pronounced and decla. *pro nulla & invalida ad omnem juris effectum:* upon which the Def. demurr'd in Law. And in this Caſe 3 Points were reſol. 1. For as much as the Def. has not ſhewed in his Barr, that the Inteſtate had *bona notabilia* in (*b*) certain, for this Cauſe it ſhall be taken that the Admini. was grant. where the Inteſtate had not *bona notab'* in ſev. Dioceſes: But yet it was agr. That ſuch Adminiſtra. was not void, (*c*) but voida. as it was adju. in (*d*) *Hugh Vere's* Caſe, as ap. *in the* 5*th Part of my Reports. fol.* 29 *&* 30. 2. It

(*a*) Swinb. 355. 357.

(*a*) Swinb. 355. 357.

(*b*) Swinb. 355. 357.

(*c*) Cr. El. 283. 457. Hob. 185. Swinb. 355. 1 Rol. Rep. 423.

(*d*) Swinb. 357. Moor 145. 5 Co. 30 a. 2 Jones 78. 3 Bulſtr. 176. Dav. 44. a. 47. a. 4 Leon. 222.

2. It was objected, That forasmuch as the Administr. grant. to the Def. was not void, but (*a*) voidable, so long as it was in Force the inferior Ordinary ought not to have commit. Administration, for the prerogative Administr. granted by the Archb. and the Administr. granted by the inferior Ordinary can't (*b*) stand and be both of Effect together; for thereupon Confusion will ensue; and therefore the Administration granted by the inferiour Ordinary was utterly void; And although the said prerogative Administration be afterwards revoked, that shall not make the other Administration of any better Effect than it was at the Time it was granted, *quia (c) quod in initio non valet tractu temporis non convalescit.* But it was answer. and resolved, That now in as much as the Ecclesiast. Judge has pronoun. and declar. the Letters of Administra. grant. to the Defend. *pro nulla & invalida ad omnem juris effectum*, we must give Credit to them, that it was for Causes not appearing to us void *ab initio. Vide* 17 *Eliz. Dyer (d)* 339. the like Judgm. upon the same Rea. Also the Administration is but an Authority, because he has noth. to his (*e*) own Use, but all to the Use of ano. and an Autho. may expect and commence *in futuro*, and theref. it shall be suspended 'till the other be repealed or declared void. And it was said, that there are *tria genera Executorum, primus a Lege constitutus, & ideo dicitur legitim', ut Episcopus; secundus a Testatore constitutus, & ideo dicitur testamentarius, ut Executor; tertius ab Episcopo constitutus, & ideo dicitur dativus, ut Administrator.* And it is to be observed, That the Bishop who is Execu. appointed by the Law, is not permitted by the Law to make a Release of any Debt, (*f*) or Gift of any Goods; for he has a special Property in the Deceased's Goods for the Ben. of the dead, and nothing to his own Use; and it appears in 9 *Eliz. Dyer* 255. that the Ordinary has not (*g*) Power to give Autho. to ano. to sell the Deceased's Goods, because he himself has no such Autho. and the Stat. of *West.* 2 *Cap.* 10. (*h*) *Bona deven' ad manus Ordinarii disponenda*, that is, for the Good of the Decea. and as to this Purpose he is like an Administrator, *duran' (i) min' ætate*, who has a special Pow. commit. to him to dispose of the Decea. Goods for his Ben. and noth. in Prejudice of the Execu. as it is held in *Prince's Case in the 5th Part of my Reports*, 29. *b.* So the Lord who takes a Surrender of Lands held by Copy of Court Roll, to the Use of ano. has Power (*k*) only to grant it according to the Use of the Surrend. and not to any Stran. as it is held in the *4th part of my Reports in Westwick's Case. Vide* 7 *H.* 4. 18. *b.* the (*l*) Ordi. shall not have an Acti. of Tresp. for carry. away the Goods before an actual Possession of them (as Executors or Administr. may have) but before Possession the Ordinary shall sue for them in the Spiritual Court; and *Fitzherbert* in abridging the Case, *tit. Trespasse* 97. *ex hoc sequitur,*

(*a*) Cr. El. 283, 457. Hob. 185. Swinb. 355. Moor 693. 1 Rol. Rep. 423.

(*b*) Plo. 281. a.

(*c*) 2 Co. 55 b. 4 Co. 2. b. 90. a. Cro. Eliz. 585. Co. Lit. 35. a. 20 Co. 62. a. Harr. 51. Dav. 32 a. Cawly 214. 2 Bulstr. 304, 305. 3 Bulstr. 292.

(*d*) 3 Co. 78. b. 6 Co. 19. a. Dyer 339. pl. 46. 1 Sid. 21. 2 Keb. 22. Postea 143. b. Cro. El. 460.

(*e*) Antea 133. a. Cart. 134.

(*f*) 9 Co. 39. a. Swinb. 351. Co. Lit. 292. a.

(*g*) 5 Co. 34. a. 9 Co. 39. a. 1 Rol. 918. Swinb. 351, 352. Dyer 355, 356. pl. 8. 1 Keb. 854. Wentworth 250. 2 Inst. 398. Kelw. 81. a. b.

(*h*) West. 2. cap. 19. 2 Inst. 397.

(*i*) 5 Co. 67. b. Cro. El. 678, 679, 718, 719. 2 And. 132. Raym. 484. Swinb. 288. 3 Leon. 278. March 138. 2 Inst. 398. Owen 35. Dall. 85.

(*k*) Co. Lit. 59. b.

(*l*) F. N. B. 120. d. Br. Trespass 83. Br. Jurisdiction 23. Br. Ordi. 5.

ſequitur, That the Ordinary ſhall not have an Action of Debt, (*a*) as Ordinary. 3. It was reſolved, That the committing of (*b*) Adminiſtration by the Archbiſhop to the Obligor, ſhall not extinguiſh the Debt, but the Debt remains; But if the Obligee makes the Obligor his Executor, it is a Releaſe in Law of the Debt, for it is the Act of the Obligee himſelf; and therewith agrees 8 *E.* 4. 3. *a.* 21 *E.* 4. 2. *b.* &c. in the ſame Manner as if a Woman Obligee marries the Obligor, or one of the Obligors, it is a Releaſe in the Law of the Debt, for it is by the Act of the Obligee her ſelf, and therewith agree 11 *H.* 7. 4. & 21 *H.* 7. 29. But if a Woman (*d*) Executrix marries the Debtor, it is no Releaſe in Law, becauſe ſhe has the Debt in another Right, and if it ſhould amount to a Releaſe in Law, it would amount to a *devaſtavit*, which is a Wrong, which the Law will not ſuffer. And ſo it was adjudged in the King's Bench, *Mich.* 30. & 31. *Eliz.* where in Debt againſt a Woman (*e*) Executrix, ſhe pleaded fully adminiſtred, and it was found that the Defendant had married the Obligor, and that the Husband was dead, and it was adjudged to be no Releaſe in Law, nor the Debt extinct, but only ſuſpended during the Coverture, and ſo a Difference. Note, that *Fleta lib.* 2. *cap. de Teſtamentis*, *De bonis defuncti trina debet eſſe Diſpoſitio*; 1. *Neceſſitatis*, *ut* (*f*) *funeralia*; 2. *Utilitatis*, that every one ſhall be paid in ſuch Precedency as he ought to be. 3. *Voluntatis*, as Legacies, &c.

(*a*) 1 Rolls 906.
(*b*) 1 Siderf. 79. 1 Leon 90, 91. 1 Roll. 934. Swinb. 325, 300, 301. Salk. 303.
(*c*) 1 Brownl. 76. Cr. Car. 373. Co. Lit. 264. b. 1 Rolls 934. Plowd. 184. b. 186. a. Hob. 10. Cr. Car. 373. Went. 45. Yelv. 160. Moor 236, 855. 1 Jones 345. Hutt. 128. 1 Rol. 940. Br. Execu. 112. 8 E. 4. 3. a. Swinb. 300, 301. Hutt. 17.
(*d*) 1 Roll. 934, 940. Co. Lit. 264. b.
(*e*) Cr. El. 114. 1 Roll. 934, 935. Co. Lit. 264. b. Moor 236. 1 Leon 320.
(*f*) 20 H. 7. 5. a. 3 Inſt. 202.

Paſch.

Paſchæ 8 Jacobi Regis.
In Communi Banco.

Sir FRANCIS BARRINGTON's *Caſe.*

2 Brownl. 289, 322, 323, 324, &c. Godb. 167, 168.

BEtween *Richard Chalke* Plaintiff in Replevin, and *Will. Peter* and *Nicholas White* Defendants, which began *Hill.* 6 *Jacobi, rot.* 157. on a long and impertinent Pleading, the Caſe was ſuch; Sir *Robert Rich* Lord *Rich* was ſeiſed of the Foreſt or Chaſe of *Hatfield* (whereof the Place where, &c. was Parcel) in Fee, and by his Deed indented, bearing Date 30 *Jan.* 19 *Eliz.* for good Conſideration granted to Sir *Thomas Barrington* Knight, and his Heirs, *omnes boſcos arbores tam marem' ſubboſcos & ſpinas quam alia genera quorumcunque, adtunc creſcent' ſtant' & exiſtent' ſimul cum omnibus arboribus, vocat'* Timber Trees, *boſcis, ſubboſcis, & ſpinis quibuſcunque, quæ ad aliquod tempus extunc impoſterum forent creſcent' ſtant' renovant' ſive exiſtent' in & ſuper illis partibus foreſta præd' communiter vocat'* Buſhend Quarter, *& Quarterium vocat'* Takely Quarter (except the Land and Soil of the ſame Wood) with Liberty to encloſe them, and to hold them incloſed for the Preſervation of the Spring of Wood which ſhould be for ſuch Time, as by the Laws and Statutes of the Realm is appointed and enacted, and not otherwiſe *abſque moleſtatione ſeu interruptione* of the ſaid Lord *Rich* his Heirs or Aſſigns, and to exclude the Deer and all other Cattel out of the Wood ſo incloſed, and to have the Herbage and Feeding thereof as any Owner of the Wood might do by the Laws and Statutes of this Realm, without

without Interruption of the ſaid Lord *Rich*, his Heirs or Aſſigns. And that the Plaintiff is ſeiſed of a Houſe and ſix Acres of Land in *Hatfield* in Fee, to which he has common Appurtenant for all Cattel levant and couchant, *&c.* in and through the whole Forreſt or Chaſe of *Hatfield*; which Grant made by the Lord *Rich*, was in Performance of an Award made between the ſaid Lord *Rich*, and Sir *Tho. Barrington*, by the Lord *Burghley* Lord Treaſurer of *England*, *Thomas* Earl of *Suſſex*, Sir *William Cordel* Maſter of the Rolls, and Sir *Gilbert Gerrard* Attorney General, which Arbitrament and Grant was confirmed and eſtabliſhed by (*a*) Act of Parliament, *Anno* 27 *Eliz.* with a * ſaving to all Strangers, *&c.* And that the ſaid Sir *Tho. Barrington* died, after whoſe Deceaſe the ſaid Wood deſcended to Sir *Francis Barrington*, as to his Son and Heir, who, 1 *Feb.* 1 *Jacobi*, fell'd the Wood in the Place in which, *&c.* and took it to his own Uſe, and 10 *Mar.* following incloſed it for the Preſervation of the Spring, and ſo has maintain'd it, according to the Laws and Statutes of this Realm: And the Parties demurr'd in Law: And if the Pl. was barred of his Common or not was the Queſtion. And in this Caſe the Defendants pleaded the ſaid Arbitrament, and the ſaid Act of Parl. at large; but to no Purpoſe, for without Queſtion, neither the Arbitrament nor the Act (in Reſpect of the ſaving) can barr the Pl. of his Common: but all the Doubt of the Caſe ariſes upon 2 Acts of Parl. not pleaded, *ſc.* the Act of (*b*) 22 *E.* 4. *cap.* 7. and the Act of 35 *H.* 8. *cap.* 17. And 1. it was objected, That the ſaid Act of 22 *E.* 4. has barred the Pl. of his Common; for by the ſame Act it is enacted, That if any of the King's Subjects having Woods growing in his own Ground, within any Forreſt, Chaſe, or Purlieu, *&c.* cauſes the ſame Wood, or any Part thereof to be fell'd by Licence of the King, or his Heirs, in his Forreſts, Chaſes, or Purlieus, or without Licence, in the Forreſt, Chaſe or Purlieu of any other Perſon, or make Sale of the ſame Wood; Be it lawful for the ſaid Subjects Poſſeſſors of the ſame Ground whereupon the Wood grew, and to other Perſons to whom ſuch Wood ſhall be ſold, immediately after the Wood ſo fell'd, to coppice and encloſe the ſame Ground with ſufficient Hedges able to keep out all manner of Beaſts and Cattle out of the ſame Ground, for the Preſervation of their young Spring: and the ſame Hedges ſo made, the ſaid Subjects may keep continually by the ſpace of 7 Years next after the ſame incloſing; and there is no Saving in the Act for the Commoners; and therefore (as it was urged) they ſhall be excluded of their Common during the 7 Years; for every one is party and privy to an Act of Parliament And the Rights and Intereſts of thoſe which are not ſaved by the Act of Parliament are bound; And the Makers of the Act have greater Regard to the Preſervation of the Spring of Woods for the Common-

(*a*) 2 Brownl. 289, 323, 324, 325. Godb. 167, 168.

* 1 Jones 235.

(*b*) 2 Brownl. 290, 322, 323, 324, 325, 326, 327, 328. Godb. 167, 168, 169, 170, 171. 4 Inſt. 304. 1 Rolls. Rep. 92. 1 Jones 235.

Wealth in Maintenance of Timber and Woods, than to Common in the Woods of Subjects within Forreſts or Chaſes after a reaſonable Time, till the Spring be of ſuch Growth that Beaſts or Cattel cannot hurt or hinder it. And theſe Words, To incloſe the ſame Land with ſufficient Hedges able to exclude all Manner of Beaſts or Cattel out of the ſame Ground, were ſtrongly urged to prove the Intent of the Makers of the Act, to exclude not only the Beaſts of the Forreſt, or Chaſe, but alſo Cattel of Commoners; for Beaſts of the Forreſt are not called Cattel; and the Words are, able to exclude all manner of Beaſts and Cattel out of the ſame Ground; which general Words extend to Beaſts and Cattel of the Commoner. To which it was anſwered by the Plaintiff's Counſel, 1. That the ſaid Act of 22 *E.* 4. doth not extend to this Caſe, becauſe the Statute extends only to thoſe who are Owners of the Ground; for the Words of the Act in divers Parts thereof are, growing on their proper Ground, and in this Caſe Sir *Francis Barrington* has but a Profit apprender in another's Ground, for the Ground remains to the Lord *Rich.* 2. It was anſwered, That the Stat. of *(a)* 35 *H.* 8. *cap.* 7. which is in the Negative, *That it ſhall not be lawful to any Perſons which have or ſhall have any Woods wherein any ought to have any Common, &c. to fell and cut down the ſame Woods (except it be to his own Uſe and Occupation) untill ſuch time as the 4th part of the ſaid Ground or Soil, &c. be divided, &c. fenced and incloſed, &c. Et (b) leges poſteriores, priores contrarias abrogant.* To which it was anſwered by the Defendant's Council, That Sir *Francis* was out of this Prohibition, and within the Exception of this Branch; for he has taken the ſaid Wood to his own Uſe; and he who takes Wood wherein others have Common is out of the Prohibition of this Act. And now this Term the Caſe was argued at the Bench by the Judges, and in this Caſe theſe Points were reſolved. 1. That Sir *Francis Barrington* has an *(c)* Inheritance as Profit apprender *in alieno ſolo*, and that the Soil remains to the Lord *Rich.* 2. That the Statute of 22 *E.* 4. ſhall extend to Sir *Francis Barrington*, notwithſtanding he has not the Soil; for the Words are, that it be lawful for the ſaid Subjects Poſſeſſors of the ſame Soil, or to other Perſons to whom ſuch Wood ſhall be ſold; and the ſaid Grant for the Conſiderations in the ſaid Award mentioned to Sir *Thomas Barrington* and his Heirs, was a perpetual Sale to him within the Words and Intention of the Act. 3. The ſaid Act doth not extend to the Wood of a Subject, in which any other has Common, but only to a ſeveral Wood: For by the Common Law, he who has a Wood in which another has Common cannot encloſe it to exclude the

(a) 35 H. 8. c. 17. 2 Brownl. 290, 322, 324, 325, 328. Godb. 167, 169, 171.

(b) 11 Co. 59. a. 62. b. 64. b. 1 Jones 186. 1 Co. 25. b. Cr. Jac. 121. 12. Co. 8. 2 Brownl. 324. Godb. 169. 2 Roll. Rep. 410. 423. Stanf. Prer. 69. b. Hawks Max. 452. 2 Inſt. 685.

(c) 2 Brownl. 324, 325. 11 Co. 49. b. 1 Rolls Rep. 96, 99, 137.

the Commoner of his Common, be it in Forreſt or Chaſe, or out of Forreſt and Chaſe. But he who has a ſeveral Wood in a Forreſt, may after the Fall incloſe it for 3 Years *parvo foſſato* (a) *& baſſa haia ſecundum aſſiſam foreſta*, as appears by the *Ad quod Damnum* in the Regiſter 257. Then it appears by the Preamble of the ſaid Act, that it extends only to a ſeveral Wood; for it recites, That where Subjects have fell'd their Woods, *&c.* they could not heretofore encloſe their Ground to preſerve the Germens longer than 3 Years, which proves what the common Law was before in ſuch Caſe; but without Queſtion that extends only to a ſeveral Wood; for none could incloſe a Wood wherein another had Common for a Day, *&c.* But now this Statute has enlarged the Time to 7 Years, and has alſo raiſed the Hedges; for where he might before encloſe it *parvo foſſato* (b) *& baſſa haia*, he may now make *magnam & altam haiam*, ſufficient to exclude all manner of Beaſts and Cattel. 4. It appears by the Preamble, between what Perſons, and for and againſt what Perſons this Act was made; and the Parties to this great Contract by Act of Parliament are, the Subjects having Woods, *&c.* within Forreſts, Chaſes, or Purlieus of one Part, and the King and other Owners of Forreſts, Chaſes and Purlieus of the other Part, ſo that the Commoners are not any of the Parties between whom this Act was made: And therefore the Caſe well argued in 21 *H.* 7. 8. *a. b. inter the Prior of* (c) *Caſtleacre, and the Dean of St. Stephens*, and left at large in the printed Report, was afterwards adjudged, as appears by the Record thereof, which began *Paſch.* 18 *H.* 7. *Rot.* 416. that the Act of * 2 *H.* 5. being made between the Kings and Priors Aliens, by which the Priorys Aliens were given to the King, did not extinguiſh the Annuity of the Prior of *Caſtleacre* which he had out of a Rectory Parcel of a Priory Alien, although there was not any ſaving in the Act. And *Mich.* 25 *&* 26 *Eliz.* (d) *Boſwel's Caſe in Curia Wardorum*, where it was reſolved, That when an Act makes any Conveyance good againſt the King, or any other Perſon or Perſons in certain, it ſhall not take away the Right of any other, altho' there be not any Saving in the Act. 5. If the Act had extended to Wood in which others had Common; yet the Concluſion reſtrains the Generalty of the precedent Words; for the Statute doth not give an abſolute and infinite Power to the Owners of Woods to encloſe, *&c.* but to encloſe the Ground, to keep it enclos'd, and to repair it, without (e) ſuing the King's Licence, or other Perſons, or their Officers, of the ſame Forreſts, Chaſes, or Purlieus, ſo that this Concluſion limits the precedent Words only againſt the King, and other Owners of Forreſts, Chaſes, and Purlieus; but no Word in the whole Act gives Authority to them to encloſe againſt any Commoner. And where it was ſaid, that this Word Cattel cannot be applied

(a) 2 Brownl. 326. Godb. 170.

(b) 2 Brownl. 326.

(c) 2 Brownl. 326, 327. Godb. 170. 1 Jones 235, 236.

* 1 H. 5. cap. 7.

(d) 2 Brownl. 323, 327. Godb. 168, 170. Moor 131, 132. Cr. El. 808. 2 Anderſ. 190, 191.

(e) 2 Brownl. 326.

to Beasts of the Forrest; it was answered, That they might fitly and properly be called Beasts and Cattle of the Forrest. And so it is said in the Preamble of this very Act, Beasts and Cattle of the Forrest. And it is to be known, that there are five manner of Beasts of the Forrest, *sc.* Hart, Hind, Hare, Wild Boar, and Wolf; (*a*) and five manner of Beasts of Chase, *sc.* Buck, Doe, Fox, Martin, and Roe; and Beasts and Fowls of Warren are, Hare, Coney, Feasant, and Partridge. *Vide Regist'* 96. 43 *E.* 3. 13. 38 *E.* 3. 10. 3 *H.* 6. 12, 15. *Liber Intr' Trespass in Hunting*, 585. 12 *H.* 8. 9. *b.* (*b*) *Holinshed's Chronicle* 306. *num.* 30. 6. it was resolved, That the said Clause of the Act of 35 *H.* 8. in the Negative, restrains only the Owner of the Wood from felling his own Wood on a Penalty, which without Question doth not exclude the Commoner of his Common: And the said Words (*c*) (*except it be to his own Use or Occupation*) serve to exclude the Owner out of this Penalty, and are to be intended of his own proper necessary Use; as to repair his House, or to burn in his House, *&c.* Then there is another Clause which prohibits the Commoner *that after the said felling* (that is to say, after the Division and Felling, for the Division of the fourth Part ought to preceed the Felling) *in any such Part*, i. e. *in the fourth Part*, so divided, no Beasts or Cattle, during seven Years, shall be suffered to feed there, upon Penalty, *&c.* and the Lord is excluded to feed with his Cattle in the three Parts during the seven Years, and after the seven Years (until a new felling, according to the Act) the Commoner shall have his Common again. And it is to be observ'd, That by the Statute of 22 *E.* 4. the Owner of the Wood ought first to fell the Wood, and after enclose, and by the Statute of 35 *H.* 8. he ought first to enclose, and after, within four Months, fell the Wood. 7. It was resolved, That the Statute of *West.* 2. * *de malefactoribus in parcis*, *Charta de Foresta*, and these Acts of 22 *E.* 4. and 35 *H.* 8. are generally Laws concerning all Persons, whereof the Court *ex Officio*, ought to take Notice, and *eo potius*, because this Act of 22 *E.* 4. concerns the King.

(*a*) Co. Lit. 233. a.

(*b*) 2 Brownl. 327.

(*c*) Hard. 368.

* West. 1. c. 20. 2 Inst. 198, 199. (*a*) 2 Brownl. 322, 324, 325, 327. Godb. 168, 169, 171. 4 Co. 76. a. 77. a. 2 Rolls. 465, 466. 8 Co. 28. a. Doct. pla. 336, 337. Yelv. 106. Hob. 310.

Pasch.

Paſch. 8 Jacobi Regis.

Dr. DRURY's *Caſe.*

ALIAS prout patet Termino Sanctæ Trinitatis, Anno Regni Domini Regis nunc Angliæ, Franciæ, & Hyberniæ ſeptimo, & Scotiæ quadrageſimo ſecundo, Rot' 3642. continent ſic. Surr' ſſ. Præceptum fuit Vic', cum ex gravi querela Owyni Bray de Cobham in comitatu prædicto generoſi, dom' Regi eſſet graviter conquerendo monſtratum, qd' cum quidam Johannes Drury legum Doctor nuper in Cur' domini Regis de Banco hic, ſcil. Termino Sancti Michaelis, anno regni dicti dom' Regis Angliæ quinto, coram Juſticiar' dicti dom' Regis de Banco præd' hic, ſcil. apud Weſtmonaſterium, per conſiderationem ejuſdem Curiæ recuperaſſet verſus præfatum Owynum tam quoddam debitum ducentarum librarum, quam triginta tres ſolidos & quatuor denarios, qui eidem Johanni in eadem curia dicti dom' regis hic adjudicat' fuerunt pro damnis ſuis quæ habuit occaſione detentionis debiti illius, unde convict' eſt: Cumque etiam idem Owynus, pro eo quod non venit in eadem Curia dom' Regis hic ad ſatisfaciendum præfato Johanni de debito & dampnis prædictis in exigend' poſit' fuiſſet in com' dom' Regis Suſſex' ad utlagand', & ea occaſione poſtmodum, ſcil. decimo nono die Maii, anno regni domini Regis nunc ſexto, utlagat' fuit, ac licet idem Owynus in executione pro debito & damnis prædictis virtute cujuſdam brevis dicti dom' regis de Capias utlagat' inde nuper vic' præd' comit' Surr' per Harbertum Morley armigerum tunc Vic' præd' com' Surr' ad ſectam præd' Johan' Drury capt' & impriſonat' fuit: Et poſtqu' ſic capt' & impriſonat'

prisonat' fuit per eundem vic' ext' prisonam illam ad largum quo voluit libere & voluntarie ire permissus, & ab executione prædict' deliberat' fuit, prout idem Owynus viis & modis quib' convenit parat' fuit docere: prædictus tamen Johannes executionem de debit' & dampnis præd' versus ipsum Owynum occasione Recuperationis prædict' jam tarde prosecut' est, ac ipsum Owynum ea occasione capi & in prisona dicti domini Regis detineri conatus & machinat' est minus juste, in ipsius Owyni dampnum non modicum & gravamen, unde dicto domino Regi supplicasset, sibi per eundem dominum Regem de remedio congruo in hac parte provideri: Idem dominus Rex volens eidem Owyno in hac parte fieri quod foret justum, Justiciariis suis hic mandaverat, quod audita querela ipsius Owyni in ea parte, vocatisque coram eis partibus prædictis aliisque quos in ea parte viderint evocand', auditisque hinc inde earum rationibus, eidem Owyno plenam & celerem Justiciam fieri facerent in ea parte, quod de jure & secundum legem & consuetudinem regni Dom' Regis Angliæ foret faciend': Quod venire fac' hic ad hunc diem, scil. a die sancta Trinitatis in quindecim dies prædictum Johannem de & super præmissis respons' ulteriusque fact' & receptur', quod curia Domini Regis hic de eo cons. in ea parte. Et modo hic ad hunc diem venerunt tam prædictus Owynus per Othonem Gayer Attornatum suum, quam prædictus Johannes per Johannem Nye Attornatum suum: Et super hoc idem Owynus dicit, quod cum prædictus Johannes nuper in Curia dicti domini Regis hic, scil. Termino sancti Michaelis anno regni domini Regis nunc Angliæ &c. quinto, coram Edwardo Coke milite, & sociis suis tunc Justic' dicti domini Regis de eodem Banco hic, scil. apud Westmonasterium, per considerationem ejusdem Curiæ recuperasset versus præfatum Owynum, tam prædictum debitum ducentarum librarum, quam prædictos triginta tres solidos & quatuor denarios qui eidem Johanni in eadem Curia dicti dom' Regis hic adjudicat' fuerunt pro dampnis suis que habuit occasione detentionis debiti illius unde convict' est: Cumque etiam idem Owynus pro eo quod non venit in eadem Curia dict' domini Regis hic ad satisfaciend' præfato Johanni de debito & dampnis suis in exigend' posit' fuisset in prædicto comitatu Sussexiæ ad utlagand', & ea occasione postmodum, scil. nono die Maii, anno Regni dicti Domini Regis nunc sexto, utlagat' fuit, super quam quidem utlagarium prædictus Johan' Drury, postea, scil. Termino sanctæ Trinitatis an' reg' dom' Regis nunc sexto supradicto prosecut' fuit extra Curiam dom' Regis de Banco hic quoddam brevi dicti dom' Regis de Capias utlagat' vers. ipsum Owynum tunc vicecomiti præd' Comitatus Surr' directum, per quod quidem breve idem dominus

minus Rex eidem tunc vic' Surr' præcepit, quod non omittat propter aliquam libertat' com' ſui quin caperet prædict' Owynum utlagat' in com' Suſſ. præd' decim' nono die Maii, anno regni dicti domini regis nunc ſexto ſupradict' ad ſectam præd' Johannis Drury de placito debiti, unde convict' eſt, ſi &c. Et ſalvo &c. ita quod haberet corpus ejus coram Juſtic' dicti dom' regis hic in craſtino Animar' tunc prox' ſequent' ad faciend' & recipiend' quod curia dicti dom' regis hic tunc de eo conſ. in ea parte: virtut' cuj' quidem brevis idem Owynus poſtea, ſcil. 7 die Octob. anno 6. ſupradicto, apud Guilford in præd' com' Surr', per præd' Herbertum Morley, tunc vic' prædicti com' Surr' exiſten' in executione pro debito & dampnis præd' ad ſectam prædicti Johannis Drury captus & impriſonatus fuit, ac poſtquam ſic captus & impriſonatus fuit idem Owynus per eundem vic' eiſdem die & anno apud Guilford prædictam extra priſonam illam ad largum quo voluit libere & voluntar' ire permiſſus, & ab executione præd' deliberat' fuit: Et hoc paratus eſt verificare, unde petit judicium, Et quod prædictus Johannes ab executione ſua prædicta prætextu judicii prædict' habend' præcludatur, & qd' idem Owynus inde exoneretur &c. Et prædictus Johannes petit licentiam inde interloquendi hic uſque in Octab' ſancti Michaelis, & habet &c. Idem dies datus eſt præfato Owyno hic &c. Ad quem diem loquela prædict' adjornata fuit per breve dom' regis de communi adjornamento hic uſque a die ſancti Mich' in unum menſem tunc proxim' ſequen': Ad quem diem hic venit tam prædictus Owynus quam prædictus Johannes per Attornatus ſuos prædict': Et ſuper hoc idem Johannes ulterius petit licentiam inde interloquendi hic uſque in Octabis ſancti Hillarii. Et habet &c. Idem dies datus eſt præfato Owyno hic &c. Ad quem diem hic ven' tam prædictus Owynus quam prædictus Johannes per Attornatos ſuos prædictos: Et ſuper hoc idem Johannes ulterius petit licentiam inde interloquendi hic uſque a die Paſchæ in 15 dies, Et habet &c. Idem dies datus eſt præfato Owyno hic &c. Ad quam quidem quindenam Paſchæ hic venerunt tam prædictus Owynus quam prædictus Johannes per Attornatos ſuos prædictos: Et ſuper hoc idem Owynus petit quod prædictus Johannes ad breve & narrationem ſua prædicta reſpond'. Et prædictus Johannes Drury dicit, quod ipſe per aliqua præallegata ab executione ſua prædicta de debito & dampnis prædictis verſus ipſum Owynum habend' præcludi ſeu retardari non debet, quia dicit, qd' poſt præd' tempus quo ſupponitur præd' Owynum extra cuſtodiam præd' vicecomitis Surr' evaſiſſe, & ante aliquam ulteriorem executionem verſus præfat' Owynum per ipſum Johannem prætextu judicii præd' proſecut' & habit', ſcil. termino ſancti Michaelis, anno regni

dicti domini Regis nunc ſexto ſupradicto, extra prædictam Curiam dicti domini Regis de banco hic ſuper utlagaria prædict', ut præfertur, promulgata emanabat quoddam breve ipſius domini Regis de Capias utlagat' verſus ipſum Owynum ad ſectam ipſius Johannis tunc vic' comitat' Midd' directum, per quod quidem breve idem dominus Rex præfat' tunc vicecom' Midd' præcepit, quod non omitteret propter aliquam libertatem comitat' ſui quin caperet prædictum Owynum per nomen Owyni Braye nuper de Cobham in comitatu Surr' generoſ. utlagat' in prædicto comitatu Suſſex prædict' decimo nono die Maii, anno regni domini Regis nunc ſexto ſupradicto, ad ſectam ipſius Johannis per nomen Johannis Drury legum doctor' de placito debit', unde convict' fuit, ſi invent' eſſet in balliva ſua, & eum ſalvo cuſtodiret, Ita quod haberet corp' ejus hic, ſcil. apud Weſtmonaſterium prædict', in præd' craſtino Animar' illo eod' termino ſancti Mich' an' ſexto ſuprad', ad faciend' & recipiend' quod cur' dicti domini regis de eo conſ. in ea parte: Ad quem quidem craſtinum Animarum hic, ſcil. apud Weſtmonaſter' præd' ven' prædict' Owynus per Willihelm' Browne tunc Attornatum ſuum: Et vicecom', viz. Georgius Bolles & Richardus Farringdon tunc' vic' præd' com' Midd' tunc hic mand', quod prædict' Owynus non fuit invent' &c. Et ſuper hoc idem Owynus tunc petiit auditum brevis de Exigi fac' ſuper quo idem Owynus ad ſectam prædicti Johannis Drury in forma prædicta utlagat' extitit: Et ei tunc legebatur in hæc verba. Jacobus *Dei gratia Angliæ, Scotiæ, Franciæ, & Hiberniæ, Rex, fidei defenſor &c. vicecomiti Suſſex ſalutem. Præcipimus tibi, quod exigi facias* Owynum Braye *nuper de Cobham in comitatu Surr' generoſum de comitat' in comitat', quouſque ſecundum legem & conſuetudinem Regni noſtri Angliæ utlagatur, ſi non comparuerit, Et ſi comparuerit, tunc eum capias & ſalvo cuſtodire facias, Ita quod habeas corpus ejus coram Juſticiariis noſtris apud Weſtmonaſterium in Craſtino ſanctæ Trinitatis ad ſatisfaciendum* Johanni Drury *legum Doctori, tam de quodam debito ducentarum librarum quod idem* Johannes *in eadem Curia noſtra coram Juſticiariis noſtris apud Weſtmonaſtrium recuperavit verſus eum, quam de triginta tribus ſolidis & quatuor denariis qui eidem* Johanni *in eadem Curia noſtra adjudicat' fuerunt pro dampnis ſuis quæ habuit occaſione detentionis debiti illius, unde convictus eſt: Et unde mand' Juſtic' noſtris apud Weſtmonaſterium in Octabis ſancti Hillarii, quod præd'* Owynus *non eſt inventus in balliva tua: Et habeas ibi hoc breve. T.* Edw. Coke *apud Weſtm' viceſimo quinto die Januarii, Anno Regni noſtri Angliæ, Franciæ, & Hiberniæ, quinto, & Scotiæ, quadrageſimo primo.* Quo lecto & audito idem Owynus tunc dixit, quod ipſe de utlagar' præd' onerari non deberet: Eo quod prædict' breve

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de exigend' non habuit aliquem certum diem retorn', his literis (ſanct') inter verba craſtino & Trinitatis non habentib' aliquam ſignificationem, prout per breve prædictum tunc apparebat: Et ea de cauſa idem Owynus tunc petiit judicium, Et quod utlagaria prædict' in forma prædicta promulgat' & habit' adnullaretur, evacuaretur, & pro nullo penitus teneretur. Super quo tunc viſo brevi prædicto & per Juſtic' hic tunc plene intellecto, eiſdem Juſtic' hic tunc conſtabat, quod allegatio prædict' Willihelm' Browne in exonerationem præd' Owyni de utlagaria præd' vera extitiſſet: Ideo tunc conſ, fuit in eadem cur' hic quod idem Owynus occaſione utlagar' præd' in aliquo non moleſtaretur nec gravaretur, ſed iret inde quietus &c. prout per recordum inde in eadem curia hic reſiden' plenius liquet. Et ſic idem Johannes Drury dicit, quod non habetur aliquod tale record' utlagariæ præd' quale præd' Owynus per breve & narrationem ſua præd' ſuperi' ſupponit: Et hoc paratus eſt verificare: unde petit judicium ſi ipſe ab executione ſua præd' de debit' & dampnis præd' verſ. præfat' Owynum habend' præcludi debeat &c. Et præd' Owynus dicit, quod præd' placitum præd' Johannis modo & forma prædictis ſuperius placitat' min' ſufficiens in lege exiſtit ad præd' Johannem executionem ſuam prætextu judicii præd' verſus ipſum Owynum habend' manutenend', quodq; ipſe ad placitum illud modo & forma præd' ſuperius placitat' neceſſe non habet, nec per legem terræ tenetur reſpondere: Et hoc paratus eſt verificare: unde pro defectu ſufficien' placiti præd' Johannis in hac parte idem Owynus ut pri' petit judicium: Et quod præd' Johannes ab executione ſua prætextu judicii præd' habend' præcludatur: Et quod idem Owynus inde exoneretur &c. Et præd' Johannes ex quo ipſe ſufficien' materiam in lege ad ipſum Johannem executionem ſuam prætextu judicii præd' verſus præfat' Owynum habend' manutenend' ſuperius allegavit, quam ipſe parat' eſt verificare, Quam quidem materiam idem Owynus non dedic' nec ad eam aliqualiter reſpond', ſed verificationem illam admittere omnino recuſat, ut prius petit judicum & executionem de debito & dampnis præd' verſus præfat' Owynum ſibi adjudicari &c. Et, quia Juſtic' hic ſe adviſare volunt de & ſuper præmiſſ. priuſquam judicium inde reddant, dies dat' eſt partib' præd' hic uſq; in craſtino ſanctæ Trinitat' de audiend' judicio ſuo, eo quo iidem Juſtic' hic inde nondum &c.

Paſchæ

Paſch. 8 Jacobi Regis.

Dr. DRURY's *Caſe.*

OWYN *Bray* brought a Writ of *Audita Querela* againſt *John Drury*, Doctor of the Civil Law, ſetting forth, That whereas the ſaid Dr. *Drury*, *Mich.* 5 *Jac. Regis*, in this Court, had recovered againſt the ſaid *Owyn* a Debt of 200*l.* and 33*s.* 4*d.* for Damages and Coſts, and whereas the ſaid *Owyn*, becauſe he came not into Court to ſatisfy the ſaid Debt and Damages, was put in Exigent, and thereupon 19 *Maii*, *Anno* 6 *Regis nunc*, was outlawed: And that the ſaid *Owyn*, by Force of a Writ of *Capias Utlagatum*, *ad ſectam præd' Johannis Drury capt' & impriſonatus fuit*, and in Execution for the ſaid Debt and Damages, and ſo being in Execution, was delivered out of Priſon by the Sheriff from the ſaid Execution, and ſuffered to go at large, *&c.* The Defendant pleaded, That after the ſaid Eſcape, and before the Purchaſe of the ſaid Writ of *Audita Querela*, *ſc. Mich.* 6 *Jac.* The ſaid Writ of *Capias Utlagat'* was awarded out of this Court retornable *Craſtino animarum*, at which Day the Sheriff retorn'd *Non* (*a*) *eſt inventus*; and thereupon the ſame Day the ſaid *Owyn* appeared, and demanded Oyer of the Exigent, which was read to him; and thereupon it appeared, that the Retorn of the ſaid Writ of Exigent was incertain; and thereupon he prayed, *quod utlagaria prædicta in forma præd' promulgata & habita adnullaretur, evacueretur, & pro nullo pœnitus teneretur: ſuper quo viſo brevi præd' & per Juſticiar' hic tunc plene intellecto, eiſdem Juſticiar' hic tunc conſtabat, quod allegatio præd'* Owyni *in exonerationem ſuam de utlagar' præd' vera extitiſſet; Ideo tunc conſid' fuit in eadem Curia*

(*a*) Vaugh. 158.

hic qd' idem Owynus *occasione utlagar' prad' in aliquo non molestaretur, nec gravaretur, sed iret inde quietus prout per record' inde in eadem Curia hic residen' plenius liquet: Et sic idem* Johan' Drury *dicit quod non habetur aliquod tale recordum utlagariæ prad' quale prad'* Owynus *per breve & narrationem suam prad' superius supponit: & hoc paratus est verificare: unde petit judicium si ipse ab executione sua prad' de debito & dampnis prad' versus prad'* Owynum *habend' precludi debeat,* &c. And thereupon the Plaintiff demur'd; and it was objected that the said Outlawry was not void, but (*a*) voidable, and that at the Time of the Escape (by which the said Dr. *Drury* was entitled to an Action of Debt, upon the Escape, against the Sheriff) the Outlawry was in Force, and the Sheriff * shall never take Advantage of Error in the proceeding against the Defendant, but shall be charged for the Escape, notwithstanding the Record be erroneous. And so was it adjudged in the Exchequer, *Trin.* 31 *Eliz.* by Sir *Roger Manwood*, and the other Barons, where the Case was, that *Edward Clere*, *Francis Woodhouse*, and *William Gervys*, 18 *Aug'* 28 *Eliz.* acknowledged a Recognizance of 200 *l.* in the Chancery, to *George* (*b*) *Ognell*, upon which Recognizance *George Ognell*, 16 *Jan'* 29 *Eliz.* sued a *Scire facias* out of the Chancery against the said Recognizors, upon which *Nihil* was returned; and so upon another *Scire facias*, whereupon *Mense Paschæ* 29 *Eliz.* Judgment was given, *sc. Ideo consideratum fuit per Curiam, quod prad'* Georgius *recuperaret versus prædictos* Ed. Fr. *&* Will. 200 *l.* &c. And that the said *George* have Execution against them, whereupon he sued forth a *levari facias*, upon which it was returned, that they had nothing, for which the Court did award a *Capias ad satisfaciend'* Retornable *Octob' Hill'* directed to the Sheriff of *Norfolk*, *Clement Paston* Esq; then Sheriff of the same County; by Force whereof the said Sheriff arrested the said *Francis Woodhouse*, and *William Gervys*, 16 *Jan.* 30 *Eliz.* And that the said *Francis Woodhouse*, at the Time of the said Arrest, was in Prison under the Custody of the said Sheriff, being attainted of Felony; and afterwards the said *Francis* and *William* escaped out of the Custody of the said Sheriff; upon which Escape G. *Ognell* brought an Action of Debt against the said *Clem. Paston*, being an Accomptant in the Exchequer. And in that Case it was resolved, that the Award of the (*c*) *Cap' ad satisfac'* was Erroneous; for by the Law the Bodies of the Recognizors were not liable to Execution, and yet, because the Sheriff could not take Advantage of the (*d*) Error, it was adjudg'd, that he should answer for the Escape; and therewith agrees 21 *E.* 4. 23. *b.* But it was adjudg'd, that in the Case at Bar, the *Audita Querela* doth not lie; and in this Case 2 Points were resolv'd. 1, (*e*) A Difference was taken and agreed between a Thing Collateral

(*a*) Hard. 27.

* Cro. Eliz. 893. Poph. 205. Salk. 273. Fareſl. 29. Comb. 69.

(*b*) 2 Leon. 84, 85, &c. Moor 274. Cr. El. 213, 214, 707. Yelv. 42. Godb. 403. 2 Bulſtr. 64, 65.

(*c*) 1 Roll. 897. Yelv. 42. Mo. 274. Cr. El. 3. Cr. Jac. 3.

(*d*) Cr. El. 165, 576, 707. Cr. Jac. 3, 280, 289. 2 Leon. 85. Dyer 67. pl. 16. Moor 275, 276. 9 Co. 68. a. 2 Roll. Rep. 212. Godb. 403. Hard. 85.

(*e*) 2 Roll. Rep. 254.

Collateral executory, and executed; for when an erroneous Judgment is given, and afterwards the Judgm. is reverſed by a Writ of Error, collateral Acts executory are barred thereby, as if a Man has Judgm. in a *Quare Impedit*, and has a Writ to the Biſhop, and the Biſhop refuſes to admit the Plaintiff's Clerk, now the Pl. upon this collateral Refuſal, may have a Writ of *Quare non admiſit*; but if the Defend. reverſes the Judgment in a Writ of Error, and afterwards the Plaintiff in the *Quare impedit* brings a Writ of *Quare non admiſit*, the Defend. may plead *nul tiel Record*: *Vide* 26 *E.* 3. 75. *b.* by *Wilby* and *Hill.* So it was reſolved, if *A.* be in Execution at the Suit of *B.* upon an erroneous Judgment, and afterwards eſcapes, and afterwards the Judgm. is reverſed by a Writ of Error, the Action upon the Eſcape is gone; for he may plead *Nul tiel* (*a*) *Record*, becauſe without a Record the Action is not maintainable; but yet it is true, that 'till the erroneous Judgment, or Execution, is reverſed by a Writ of Error, the Sheriff, or Gaoler, ſhall not take (*b*) Benefit thereof; for there he cannot plead *Nul tiel Record*, becauſe 'till it is reverſed, it remains of Force, altho' there is apparent Error, as it is held in 34 *H.* 6. 2. *b.* and 22 *E.* 4. 23. *b.* But in the ſame Caſe, If the Plaintiff brings an Action of Debt againſt the Sheriff, or Gaoler, upon the Eſcape, and has Judgm. and Execution, and afterwards the firſt Judgm. is reverſed; yet foraſmuch as this Judgm. upon this (*c*) collateral Thing is executed, notwithſtanding the Reverſal of the firſt, it remains in Force, as appears in the like Caſe (*d*) 7 *H.* 6. 42. *a.* where the Caſe in effect is, That the Conuſee of a Statute Staple in a Writ of Detinue of the ſaid Statute upon Garniſhment, recovers by erroneous Judgment againſt the Garniſhee, and has the Statute delivered to him; the Garniſhee brings a Writ of Error, and the Conuſee ſues Execution upon the Statute and has it; there it is held, that altho' the Garniſhee doth reverſe the Judgment, yet foraſmuch as the Statute is now executed, this Execution ſhall not be avoided by the Reverſal of the Judgment; for the Judgment was only to have the Statute delivered, and the Execution on the Statute is a Thing executed, not depending upon the Judgment. So if a Man recovers by erroneous Judgment, and preſents to a Benefice, or enters into the Perquiſite of a Villein, and afterwards the Judgment is reverſed by Writ of Error, becauſe theſe collateral Things are executed, they ſhall not be deveſted, as it is held in 4 *H.* 7. 11. and there *fol.* 12. *a.* *Brian* ſaith, that it was adjudged, That if the Defendant pleads that the Plaintiff is outlawed, and the Plaintiff replies, *quod non habetur aliquod recordum*, &c. and the Def. has a Day to bring in the Record, and before the Day the Record is reverſed, the Juſtices ſhould certify *Nul tiel Record*: and therewith agrees 6 *El. Dyer* (*e*) 228.

So

(*a*) 1 Sand. 38. Kelw. 18. b.

(*b*) Hardreſs 85. Cr. Jac. 3, 280, 289. Cro. El. 165, 576, 707. 2 Leon. 85. Dyer 67. pl. 16. Moor 275, 276. 9 Co. 68. a. 2 Roll. Rep. 212. Godb. 403.

(*c*) Cr. Jac. 646.

(*d*) Poſtea 143. b. 5 Co. 90. b. 1 Roll. 777, 778.

(*e*) Cro. Jac. 484. Yelv. 36. 1 Brownl. 83.

So in the Case at Bar, forasmuch as the Record is defeated and avoided before the Def. is obliged to plead, he may well plead *Nul tiel* (*a*) *record*, *Vide* 13 *E.* 3. *Barr* 253. But if two Judgments are giv. and the last depends meerly upon the first as upon its Foundation, there if the first fundamental Judgm. is (*b*) reversed by Writ of Error or Attaint, the latter (which appears in the Record to be dependent upon it) shall be reversed also, as in *Assise* & (*c*) *Redisseisin*: So of a Judgm. upon the Original, and another Judgm. in a (*d*) *Scire fac.* the same Law of one Judgm. given against the Tenant and another against the Vouchee and the like, 43 *E.* 3. 3. *a.* 13 *E.* 4. 4. *a.* 8 *H.* 4. 4. 4 *E.* 3. 36. 8 *H.* 7. 10. *a.* 11 *H.* 4. 6. *a. b.* 4 *E.* 4. 29. *a.* 6 *E.* 4. 9. *b.* 9 *H.* 6. 38. *b.* 10 *H.* 6. 6. And *vide* * 26 *E.* 3. 57. *a. b.* that by the Reversal of the Judgm. given in a *Quare Impedit*, the Judgm. given in a *Quare non admisit* is also reversed. 2. There is a Difference between mean Acts done in the Execut. of Justice, which are Compulsive, and Acts which are Voluntary: And therefore, if an Erroneous Judgm. is given in Debt, and the Sheriff, by Force of a *Fi' fac.* (*e*) sells a Term of the Def. and afterwards the Judgm. is reversed by a Writ of Error, yet the Term shall not be restored, but only the Sum, *&c.* because the Sheriff was commanded and compelled by the K's Writ to sell it, *&c.* But if a *Capias* (*f*) *Utlagat'* is awarded, whereby the Sheriff is commanded to take the Body, *&c.* & *bona & catalla, quæ per inquisition' invenerit in manus nostras capias ut de vero valore*, &c. and by Force of that Writ, the Sheriff, by Inquisition takes the Goods and Chattles of the Man Outlaw'd and sells them, and afterwards the Outlawry is reversed the Party shall be restored to his Goods and Chattels, because the Sheriff was not commanded nor compelled by the K's Writ to sell them; and therewith agrees 5 *El. Dy.* 223. (*g*) *Proctor*'s Case. And according to this Resolution it was adjudged in *C. B.* betw. *Amner* (*h*) and *Loddington*, and afterwards *Mich'* 26 & 27 *El.* in a Writ of Error affirmed in the K's Bench. 3. There is a Difference between a Recovery upon an elder Title, and a Reversal of a Record by a Writ of Error: And therefore if *A.* recovers Dower in antient demesn against *H.* and has Execution the Tenant reverses the Judgm. in a Writ of false Judgm. and because the Woman has held the Land for 2 Years, between the first Judgm. and the Reversal, it was inquired of the yearly Value of the Land, and the two Years tax'd to 20 Marks; and thereupon the Tenant sued a *Scire fac.* against the Woman to have Execution of the said 20 Marks: In bar of which she pleads, That she has brought a Writ of Right close, in the Nature of a *Cui in vita*, against the said *H.* the now Pl. and Process continued till she recovered the Land by elder Title, and demands Judgm. if of the Issues of the same Lands by any Judgment recover'd since, *H.* ought to have Execution: But it was adjudged, That forasmuch as the Judgment given for *H.* remain'd in Force, by Force of which he should have the said 20 Marks as Damages

(*a*) Cro. El. 270.

(*b*) Cro. Jac. 646. Plowd. 266. 2 Bulstr. 175.

(*c*) 1 Roll. 777. Yelv. 155. 9 Co. 119. b. 43 E. 3. 3. a. Palm. 187. Br. Error 23, 47. 8 H. 7. 10. a. 9 H. 6. 38. b. 11 H. 6. 17. b. 2 Bulstr. 175. 4 E. 4. 29. a. 6 E. 4. 10. a.

* Palm. 302.

(*d*) Cro. Jac. 645, 646. 2 Bulst. 175. 13 E. 4. 4. a. Br. Error 46, 170

(*e*) Antea 96. b. 1 Roll. 778. 5 Co. 90. b. Dy. 363. pl. 24. Moor 573. Cro. El. 278. Cro. Jac. 246. Jenk. Cent. 264. 2 Leon. 92. 3 Leon. 89, 90. Godb. 27, 28. Yelv. 180. Goldsb. 103, 104.

(*f*) Cr. El. 270, 278. Moor 270. 1 Roll. 778. Dy. 223. pl. 26.

(*g*) 1 And. 36. pl. 91. O. Bendl. 27. pl. 108. Godb. 84. Co. Lit. 128. b. Postea 143. b.

(*h*) 1 And. 60. Co. Lit. 351. a. Godb. 26. 1 Leon. 92. 2 Leon. 82. 8 Co. 96. b. Jenk. Cent. 264. Moor 758. 1 Bulstr. 192. 1 Roll. 612. Co. Lit. 351. a. Goldsb. 103, 104.

ſevered from the Land, and the Recovery in the *Cui in vita* doth not refer to them, for this Reaſon, altho' *A.* had recovered by elder Title, *H.* ſhould have Execution of the Damages, 20 *E.* 3. *Scire fac'* 123,* in *Herbert's* Caſe. 4. The Caſe at Bar is ſtronger, becauſe the Judgm. to avoid the ſaid Outlawry is declaratory, which declares the Outlawry to be null, and the Proceeding therein to be without Warrant, and void, and all that without a Writ of Error, becauſe there is a nullity in the Outlawry, foraſmuch as the Writ of Exigent, which is the Warrant to proceed to Outlawry, wants Subſtance, and by Conſequence no Warrant in Law; and theref. when it is ſo declared by the Judgm. of the Court, it is void *ab initio*. *Vide* (*a*) *Proctor's* Caſe, 5 *El. Dy.* 223. In 38 *H.* 6. 4. *b.* & 12. *b.* One who had Cauſe of (*b*) Privilege in the Com. Pleas was arreſted in *London*, and bef. Judgm. the Defend. deliver'd a Writ of *Superſedeas* in the inferior Court, and notwithſtand. that, the Recorder proceeded to Judgment, and thereupon his Body was taken in Execution, and afterwards his Body was brought into *C. B.* by a Writ of (*c*) *Corpus cum cauſa*; and becauſe after the (*d*) *Superſedeas* there was a Nullity in the Proceeding as well to Judgm. as in Execution, the Court awarded, that the Party ſhould be diſcharged of the Execution; and ſo he was diſmiſſed without ſuing any Writ of Error; for by this declaratory award, the Judgm. and Execution are utterly void. And *vide* 17 *El. Dyer* 339. (*e*) Adminiſtration is committed to the Wife of the Goods, *&c.* of the Huſband who recovers Debt as Adminiſtratrix, depending which Suit, the Son of the Inteſtate, by Covin betwixt him and the Defend. procures new Adminiſtration to him and his Mother, no Cauſe of Revocation of the firſt expreſſed in the ſecond, and after Judgment Releaſes to the Def. the Wife ſues Execution, the Def. upon this Releaſe brings an *Audita Querela*, and the Def. pleads the Matter *ſupra*, and Sentence declaratory that the ſecond Adminiſtration was void, and adjudged *pro Defendente*. But if the Letters of Adminiſtration had been good, and the Adminiſtrator makes a Releaſe, and afterw. the Letters of Adminiſtration are repealed, there the Releaſe is good: So there is a Difference between a Sentence declaratory, by which Letters of Adminiſtration are declared to be void, and a Sentence of Repeal, which allows them good 'till they are repealed. *Nota* Reader, where it is ſaid before in the firſt Difference, That collateral Things executed by Execution upon Eſcape, or upon the Statute recovered in the Writ of *Detinue*, in (*f*) 7 *H.* 6. 42. *a. b.* ſhall not be avoided by the Reverſal of the firſt Judgment, the ſame is true; and yet I conceive, That he ſhall have Remedy upon the Reverſal of the Judgment, by (*g*) *Audita Querela*, becauſe the Cauſe and Ground of the Collateral Action is diſproved and avoided by the Reverſal of the firſt Judgment:

* Palm. 302.

(*a*) Antea 143. 2. 1 And. 36. pl. 91. O. Bendl. 27. pl. 108. Co. Lit. 128. b. Godb. 84.

(*b*) Br. Priviledge 28, 29. Fitz. corpus cum cauſa, 8, 9.

(*c*) 2 H. 5. c. 2. Cro. Car. 261.

(*d*) Cro. El. 33. Cro. Jac. 43. Yelv. 57.

(*e*) Dyer 339. pl. 16. Antea 135. b. 3 Co. 78. b. 6 Co. 19. 2. 1 Sid. 21. 2 Keb. 22. Cro. El. 460.

(*f*) Antea 142. b 3 Co. 90. b. Br. Error 66. 1 Roll. 308, 777, 778.

(*g*) Cro. Jac. 646.

Judgment, and the first Plaintiff restored to his former Action, upon which he may have his just and due Remedy. And it is like the Case in *Dyer* 3 *Eliz.* 203. Executors have Judgment in Accompt, and have the Defendant in Execution for the Arrearages; now the Will is annulled, *quia*, the Testator an Ideot, and the Record Spiritual was removed into the Chancery by Writ, and sent into the King's Bench, where the Action was brought; and thereupon the Defendant brought an *Audita Querela*, because the Will was disapproved: And it was resolved, in *Camera Scaccarii*, *Anno* 35 *H.* 8. (as I have heard, it appears by the Record) that the *Audita Querela* did well lie.

Dyer 203, 204. pl. 75. Wentw. 21. Swinb. 47. Yelv. 83. 2 Sand. 149. Orph. Leg. 26. 1 Brownl. 91. Co. Ent. 89, 90. Noy. 15.

Trin.

Trin. 8 Jacobi Regis.

DAVENPORT's *Case.*

Robert Bradſhaw brought a *Quare Impedit* againſt *John Davenport*, *George Wood*, Clerk, and the Biſhop of *Lincoln*, of the Vicarage of the Church of *Orton ſuper Monton*, in the County of *Leiceſter* (which began *Trinit' 7 Jacobi, Rot'* 1008.) And the Caſe was ſuch, *George Haſtings* Earl of *Huntingdon*, was poſſeſſed of the Rectory of *Orton*, to which the Advowſon of the ſaid Vicarage was appendant for 15 Years; and by his Deed, 18 *Maii* 19 *Eliz.* granted to *Robert Bradſhaw* now Plaintiff, as he alledged in his Declaration, *Primam & (a) proximam advocation' & donationem præd' vicariæ de Orton cum eadem prim' & proxim' extunc vacare contingeret per aliquas vias ſeu media quæcunque, ſi ead' contingeret fore vacua durante termino annorum adtunc in eſſe de rectoria de Orton conceſſ. præfato Comiti per præfatum nuper Epiſcopum Oxonien'.* The Defendants pleaded, That after the ſaid Grant of the next Avoidance, the ſaid Earl ſo being of the ſaid Rectory, to which, *&c.* poſſeſſed, died thereof poſſeſſed, inteſtate, *poſt cujus mortem, ſcil' primo die Maii* 1605, Adminiſtration of his Goods, *&c.* was committed to *Henry* now Earl of *Huntingdon*; and afterwards the ſaid now Earl, 9 *Feb.* 3 *Jacobi*, (*b*) ſurrender'd his ſaid Term in the ſaid Rectory, to which, *&c.* to the Biſhop of *Oxford* then in Reverſion, which he accepted, *per quod præd' terminus annorum de & in rectoria præd' cum pertin' ad quam &c. determinavit*, and the Biſhop demiſed the ſaid Rectory, with the Appurtenances, to *Davenport*, one of the Defendants, for his Life; and afterwards the ſaid Vicarage became void, *&c.* upon which the Plaintiff demur'd; and the ſole Queſtion of

(a) Cro. Jac. 691.

(b) Palm. 484.

of this Case was, if by the said Surrender the said Grant of the next avoidance was void or not. And it was objected, That the said Grant of the next Avoidance was upon express Limitation. If the Vicarage became void during the Term then *in esse*, and by the Surrender the Term was merg'd and extinct: so that the Vicarage became not void during the Term, because that happen'd after the Surrender. But if the Limitation had been during the Years, there it had been otherwise, for the Years could not determine but by (*a*) Effluxion of Time. But it was answer'd and resolved, That notwithstanding the Surrender, yet the Pl. should have the next (*b*) Avoidance, and that for 3 Reasons 1. The said Limitation implies no more, than the Law would have said; for if Tenant for Years grants the next (*c*) Avoidance, the Law implies this Limitation, If the Church becomes void during the Term, and therefore (*d*) *Expressio eorum quæ tacite insunt nihil operatur*. 2. The Grantor himself wou'd derogate from his own Grant, and wou'd make it void at his Pleasure, and that is against the Rule of Law, *&c.* That the Grant of every one shall be taken * strong against himself, and most beneficially for the Grantee. And as to that, the notable Case of (*e*) *Tourston de Holland*, Parson of *Preston*, in 6 *E.* 3. 54, *b.* & 55. *a.* was cited, where the Case was; That in the Time of *R.* 1. Debate was between the Abbot of *S.* and *Theobald C.* upon the Advowson of the Church of *Preston*, and thereupon they agreed, and a Fine was levied 15 *Mich.* 6. *R.* 1. before the Archb. of *Canterbury*, the Bishop of *Rochester*, *&c.* then Justices *C. B.* between the aforesaid Abbot and the said *Theobald*; by which Fine the Abbot granted the Advowson to *T.* and to his Heirs for ever, so that at every Presentation by *T.* or his Heirs, the Clerks so presented, *&c.* should pay to the said Abbot and his Successors for ever 10 Marks *per An.* which Accord was made in the Presence of the Ordinary of the Place, who assented to it, at which Time the Church of *Preston* was void; and upon that Fine the Successors of the Abbot of *S.* brought a Writ of Annuity against the said *T. de Holland* Parson of *P.* And there *Parning* Serjeant took Exception to the Declaration, that for as much as the Grant of the Annuity is in a special Manner to be paid by the Clerks who should be presented by *T.* or his Heirs, that the Pl. ought to have shewed in his Declaration, that the Def. was presented by the said *T.* or his Heirs. To which *Sadlier* said, we intend that the Parson shall be charg'd by whomsoever he is presented. And *Herle C. J.* who gave the Rule, said, That altho' had *T.* aliened the Advowson, the Annuity wou'd not be thereby extinct: wherefore *Parning* pass'd over to another matter. By which Case it appears that altho' *T.* had aliened the Advowson, and altho' the Annuity in the Body of the Grant is limitted to be paid by the Presentees of *T.* or his Heirs, yet the Presentee of his Alienee shou'd pay it, for otherwise

(*a*) Co. Lit. 45. b. 1 Co. 154. a.

(*b*) Palm. 484.
(*c*) Cr. Jac. 691. Co. Lit. 379. a. Palm. 484. Hob. 41.
(*d*) 1 Roll. Rep. 310. 2 Roll. Rep. 393. Latch. 25. Palm. 433, 437. Antea 56. b. Wing. Max. 235. 4 Co. 73. b. 5 Co. 11. a. 11 Co. 60. a. 10 Co. 39. a. Co. Lit. 191. a. 205. a. Lit. Rep. 111. 2 Inst. 365. 2 Sand. 351. 2 Bulstr. 131. 1 Mod. Rep. 190. Hard. 92. Hob. 170. * Winch. 96.
(*e*) Hob. 41.

by his own Grant he wou'd defeat the Annuity which he himself had granted. Note Reader, in this Case of 6 *E.* 3. there are divers Things worthy Observation, and amongst them the Antiquity of the *(a)* Common Pleas; for it appears thereby that it was a Court long before the Statute of *Magna Charta* made in 9 *H.* 3 as appears also in *(b)* 26 *Ass. p.* 24. where it appears that King *Hen.* 1. made Letters Patents of Confirmation to the Abbot of *B.* of all Usages; and that they should have Conusans of all Manner of Pleas, so that the Justices of one Bench, nor the other, nor Justices of Assise, should nothing intermeddle, *&c.* which is a direct Proof, that in the Time of King *Hen.* 1. there were Courts of the one Bench and the other, and also Justices of Assise, *&c.* 3. The Term for the Benefit of the Grantee has to some Respect Continuance, and therefore if Lessee for Years grants a Rent-charge, and afterwards surrenders, yet for the Benefit of the Grantee the *(c)* Term has Continuance; although *in rei Veritate* it is determined: and therewith agrees 5 *H.* 5. 10. *a.* But it is true, that the Lessee himself by his Surrender may prejudice himself of an *(d)* Encrease of an Estate to be made to himself, as it is resolved in 35 *H.* 8. *(e) Exposition de parols* 44. *Vide the Rector of Cheddington's Case, M.* 38. *Eliz. in the First Part of my Reports, fol.* 154. *a.*

(a) Co. Lit. 71. b.

(b) Præf. 3. Rep. p. 5. Fitz. Conusans 57. Br. Conusance 40.

(c) 1 Jones 62. Cro. Car. 102. Lit. Rep. 336. Dall. 65. Poph. 40. 1 Co. 67. a. 9 Co. 107. b. Plowd. 198. a. Co. Lit. 338. b.

(d) Antea 75. b.

(e) Br. Exposition deparols 43. 1 Co. 154. a. Bridgm. 102. Co. Lit. 45. b.

Mich.

Mich. 8 Jacobi Regis.

The *Six Carpenters* CASE.

IN Treſpaſs brought by *John Vaux* againſt *Tho. Newman*, Carpenter and five other Carpenters, for breaking his Houſe, and for an Aſſault and Battery, 1 *Sept'* 7 *Jac.* in *London* in the Pariſh of St. *Giles's extra Cripplegate*, in the Ward of *Cripplegate*, *&c.* and upon the (*a*) new Aſſignment, the Plaintiff aſſign'd the Treſpaſs in a Houſe called the *Queen's Head*. The Defendants to all the Treſpaſs *præter fractionem Domus* pleaded Not guilty; and as to the breaking of the Houſe, ſaid, That the ſaid Houſe *præd' tempore quo*, &c. *& diu antea & poſtea* was a Common Tavern of the ſaid *John Vaux*, with a Common Sign at the Door of the ſaid Houſe fixed, *&c.* by Force whereof the Defendants, *præd' tempore quo*, *&c. viz. hora quarta poſt meridiem* into the ſaid Houſe, the Door thereof being open did enter, and did there buy and drink a Quart of Wine, and there paid for the ſame, *&c.* The Plaintiff by way of Replication did confeſs, that the ſaid Houſe was a Common (*b*) Tavern, and that they enter'd into it and bought and drank a Quart of Wine and paid for it, but further ſaid, that one *John Ridding*, Servant of the ſaid *John Vaux*, at the Requeſt of the ſaid Defendants, did there then deliver them another Quart of Wine, and a Pennyworth of Bread, amounting to 8 *d.* and there they then did drink the ſaid Wine, and eat the Bread, and upon Requeſt did refuſe to pay for the ſame. Upon which the Defts. did demurr in Law: And the only Point in this Caſe was, If denying to pay for the Wine, or Non-payment which is all one, (for eve. non-paym. upon Requeſt is a denying in Law) makes the Entry into the Tavern tortious. And firſt, it was reſolv'd when Entry, Authority or (*c*) Licence is given to any one by the Law, and he doth abuſe it, he ſhall be a Treſpaſſer *ab ini-*

(*a*) 2 Co. 6. 2. 18. b.

(*b*) Kelw. 38. a.

(*c*) 2 Roll. 561. Yelv. 96, 97.

tio: But where an Entry, Authority, or Licence is give by the (*a*) Party, and he abuſes it, there he ſhall be puniſhed for his Abuſe, but ſhall not be a Treſpaſſor *ab initio.* And the Reaſon of this Difference is, That in the Caſe of a general Authority or Licence (*b*) of Law, the Law adjudges by the ſubſequent Act, *quo animo*, or to what Intent he enter'd for *acta exteriora indicant interiora ſecreta. Vide* 11 *H.* 4, 75. *b.* But when the Party gives an Authority or Licence himſelf to do any thing, he can't for any ſubſequent Cauſe puniſh that which is done by his own Authority or Licence, and theref. the Law gives Autho. to enter into a com. Inn, into a Tavern, to the Lord to diſtrein; to the Owner of the Ground to diſtrein Damage feaſant, to him in Reverſion to ſee if Waſte be done; to the Commoner to enter upon the Land to ſee his Cattel, and ſuch like: *Vide* 12 *E.* 4. 8. *b.* 21 *E.* 4. 19. *b.* 5 *H.* 7. 11. *a.* 9 *H.* 6. 29. *b.* 11 *H.* 4. 75. *b.* 3 *H.* 7. 15. *b.* 28 *H.* 6. 5. *b.* But if he who enters into the Inn or Tavern doth a Treſpaſs, as if he (*c*) carries away any thing; or if the Lord who diſtreins for Rent, or the Own. for Damage feaſant, works or kills the (*d*) Diſtreſs; or if he who enters to ſee waſt breaks the Houſe, or (*e*) ſtays there all Night; or if the Commoner cuts down a Tree, in theſe and the like Caſes the Law adjudges that he entred for that Purpoſe, and becauſe the Act which demonſtrates it is a Treſpaſs, he ſhall be a Treſpaſſer *ab initio*, as it appears in all the ſaid Books. So if (*f*) a Purveyor takes my Cattel by Force of a Commiſſion, for the King's Houſe, it is lawful; but if he ſells them in the Market, now the firſt taking is wrongful; and therewith agrees, 18 *H.* 6. 19. *b. Et ſic de ſimilibus.*

(*a*) 5 H. 7. 11. a. Perk. Sect. 191. Yelv. 96, 97. 21 E. 4. 19. b.

(*b*) 2 Roll. 561. 21 E. 4. 19. b. Yelv. 96, 97. Perk. Sect. 191. 5 H. 7. 11. a.

(*c*) Perk. Sect. 191. Cro. Car. 106. Yelv. 96.

(*d*) 12 E. 4. 8. b. 9 Co. 11. a. 1 And. 65. Cro. Jac. 148. Perk. Sect. 191.

(*e*) 2 Roll. 561. 21 H. 4. 75. b. Fitz. Treſpaſs 176. Br. Treſp. 97. Br. Replication 12.

(*f*) 2 Roll. 561. 18 H. 6. 9 b. 2 Inſt. 546.

2. It was reſolved *per totam Curiam*, That (*g*) Not doing can't make the Party who has Authority or Licence by the Law, a Treſpaſſer *ab initio*, becauſe not doing is no Treſpaſs; and therefore if the Leſſor diſtreins for his Rent, and thereup. the Leſſee tenders him the Rent and Arrears, *&c.* and requires his Beaſts again, and he will not deliver them, this not doing can't make him a Treſpaſſor *ab initio*; and therewith agrees 33 *H.* 6. 47. *a.* So if a Man takes Cattel Damage feaſant, and the other offers ſufficient Amends, and he refuſes to redeliver them, now if he ſues a *Replevin*, he ſhall recover (*h*) Damages only for the deteining of them, and not for the taking, for that was lawful; and therew. agrees *F. N. B.* 69. *g. Temp' E.* 1. *Replevin* 27. 27 *E.* 3. 88. 45 *E.* 3. 9. So in the Caſe at Barr, for not (*i*) paying for the Wine the Defend. ſhall not be Treſpaſſors, for the denying to pay for it is no Treſpaſs, and therefore they can't be Treſpaſſors *ab initio*; and therewith agrees directly in the Point, (*k*) 12 *Edw.* 4. 9. *b.* For there *Pigot* Sergeant puts this very Caſe, If one comes into a Tavern to drink, and when he has drunk he goes away, and will not pay the Ta-

(*g*) Cr. Car. 106. 2 Bulſtr. 312. 1 Roll. Rep. 130.

(*h*) Lit. Rep. 34. Dr. & Stud. lib. 2. 112. b. Hetl. 16.

(*i*) 1 Roll. Rep. 66. 2 Bulſtr. 312.

(*k*) 1 Sid. 5. 12 E. 4. 9 a. b.

verner, the Taverner ſhall have an Action of Treſpaſs againſt him for his Entry. To which *Brian* Chief Juſtice ſaid, the ſaid Caſe which *Pigot* has put, is not (*a*) Law, for it is no Treſpaſs, but the Taverner ſhall have an Action of Debt: And there before (*b*) *Brown* held, That if I bring Cloth to a Taylor to have a Gown made, if the Price be not agreed in certain before how much I ſhall pay for the making, he ſhall not have an Action of Debt againſt me; which is meant of a general Action of Debt; but the Taylor in ſuch a Caſe ſhall have (*c*) a ſpecial Action of Debt; *ſc.* that *A.* did put Cloth to him to make a Gown thereof for the ſaid *A.* and that *A.* wou'd pay him as much for making, and all Neceſſaries thereto, as he ſhould deſerve, and that for making thereof and all Neceſſaries thereto, he deſerves ſo much for which he brings the Action of Debt: in that Caſe the putting of his Cloth to the Taylor to be made into a Gown is ſufficient Evidence to prove the ſaid ſpecial Contract, for the Law implies it: and if the Taylor overvalues the making, or the Neceſſaries to it, the Jury may mitigate it, and the Plaintiff ſhall recover ſo much as they ſhall find, and ſhall be barred for the Reſidue. But if the Taylor (as they uſe) makes a Bill, and he himſelf values the making and the Neceſſaries thereof, he ſhall not have an Action of Debt for his own Value, and declare of a Reteiner of him to make a Gown, *&c.* for ſo much, unleſs it is ſo eſpecially agreed. But in ſuch Caſe he may (*d*) detain the Garment till he is pay'd as the Hoſtler may the Horſe. *Vide Br. Diſtreſs.* 70. and all this was reſolved by the Court. *Vide the Book in* 30 *Aſſ. p.* 38. *John Matrevers Caſe*, it is held by the Court, that if the Lord, or his Bailiff comes to diſtrein, and (*e*) before the Diſtreſs the Tenant tenders the Arrears upon the Land, there the Diſtreſs taken for it is tortious. The ſame Law for Damage feaſant, if before the Diſtreſs he tenders ſufficient Amends; and therewith agrees 7 *E.* 3. 8. *b. in the Mr. of St. Marks Caſe*, and ſo is the Opinion of *Hull* to be underſtood in 13 *H.* 4. (*f*) 17. *b.* which Opinion is not well abridged in *Title Treſpaſs* 180. Note Reader this Difference, That tender upon the (*g*) Land before the (*h*) Diſtreſs, makes the Diſtreſs tortious, tender after the Diſtreſs and before the impounding makes the Deteiner, and not the taking wrongful; tender after (*i*) the impounding makes neither the one nor the other wrongful; for then it comes too late, becauſe then the Cauſe is put to the Tryal of the Law, to be there determined. But after the Law has determin'd it, and the Avowant has Return irrepleviſable, yet if the Pl. makes him a ſufficient Tender, he may have an Action of *Detinue* for the Deteiner after: or he may upon Satisfaction made in Court have a Writ for the Re-delivery of his Goods: and therewith agree the ſaid

(*a*) 12 E. 4. 9. b.

(*b*) 12 E. 4. 9. b.

(*c*) 1 Sid. 5.

(*d*) Hob. 42. Yelv. 67. Cro. Car. 271, 272. Br. Diſtreſs 71. Palm. 223. Hutt. 101. 22 E. 4. 49. b. Moor 877. 5 Ed. 4. 2. b. 1 Roll. Rep. 449. 2 Roll. Rep. 438. 2 Roll. 85, 92. 3 Bulſtr. 269, 272.

(*e*) Br. Diſtreſs 37. Br. Tender, &c. 18.

(*f*) 2 Roll. 561.

(*g*) 2 Sid. 40.

(*h*) 5 Co. 76. a. 2 Inſt. 107.

(*i*) 2 Roll. 561. 1 Brownl. 173. 2 Inſt. 107. 5 Co. 76. a.

Book in 13 *H.* 4. 17. *b.* 14 *H.* 4. 4. *Regist' Judic'* 37. 45 *E.* 3. 9. and all the Books before. *Vide* 14 *E.* 4. 4. *b.* 2 *H.* 6. 12. 22 *H.* 6. 57. *Dr. and Student, lib.* 2. *cap.* 27. *Br. Distress.* 72. and *Bilkington's Case, in the Fifth Part of my Reports, fo.* 76. and so all the Books which *prima facie* seem to disagree, are upon full and pregnant Reason well reconciled and agreed.

Trinit.

Trinit. 8 Jacobi Regis.

EDWARD ALTHAM's *Case.*

THomas Lawrence & Marcia uxor ejus per Carolum Cardinall Attorn' ſuum petit verſus Edwardum Altham Generoſum & Margaretam uxorem ejus tertiam partem centum acrarum terræ, decem acrarum prati, & ſexaginta acr' paſturæ cum pertin' in Gosfield ut dot' ipſi' Marciæ ex dotatione Thomæ Naſh ſenioris quondam viri ſui &c. Et prædict' Edwardus & Margareta per Johannem Rowley Attorn' ſuum ven' & dicunt, quod prædict' Thomas Lawrence & Marcia dotem ipſius Marciæ de tenementis prædictis cum pertin' unde &c. ex dotatione prædict' Thomæ Naſh, quondam viri &c. verſus eos habere non debent, quia dic' quod prædictus Thomas Naſh quondam vir &c. fuit ſeiſit' de tenementis prædictis cum pertin' unde &c. In dominico ſuo ut de feod', Et illa tenuit de Johanne Wentworth Armigero ut de manerio ſuo de Gosfield cum pertin' in com' prædicto in libero ſocagio, videlicet, per fidelitatem tantum pro omnibus ſerviciis & demand': prædictuſque Thomas ſic de tenementis prædict' cum pertin' unde &c. ſeiſitus exiſtens decimo die Aprilis, Anno dom' Milleſimo quingenteſimo nonageſimo ſecundo apud Gosfield prædictam condidit teſtamentum & ultimam voluntatem ſua in ſcriptis, & per eandem ultimam voluntatem ſuam voluit & legavit tenementa prædicta cum pertinen' unde &c. Cuidam Zachariæ Naſh filio juniori ejuſdem Thomæ Naſh, habend' & tenend' eid' Zachariæ pro termino vitæ ſuæ, ac poſtea ibid' obiit de tali ſtatu inde ſeiſit', poſt cujus mortem præd' Zacharias in tenem' præd' cum pertin' unde &c. intrav' & fuit inde ſeiſit' in dominico ſuo ut de libero tenemento pro

termino vitæ ſuæ virtute legationis præd', ac reverſio tenementor' prædict' cum pertin' unde &c. Poſt mortem prædicti Thomæ deſcendebat cuidam Thomæ Naſh, ut filio & hæredi prædicti Thomæ Naſh quondam viri &c. Per quod idem Thomas filius fuit ſeiſit' de eadem reverſione tenementorum prædictorum cum pertin' unde &c. ut de feodo & jure, ipſoque Thoma ſic inde ſeiſit' exiſten' ac prædicto Zacharia de tenementis præd' cum pertin' unde &c. Sic ut præfert', ſeiſit' exiſten' prædicta Marcia poſt mortem prædict' Thomæ Naſh quondam viri &c. In viduitate ipſius Marciæ dum ipſa ſola fuit, ſcilicet, viceſimo ſeptimo die Aprilis, anno regni dom' Eliz. nuper Reginæ Angl' tricesimo quinto apud Gosfield prædict' per quoddam ſcriptum ſuum relaxationis quod iidem Edward' & Margareta ſigillo præd' Marciæ ſignat' hic in Cur' proferunt, cuj' dat' eſt eiſdem die & anno, per nomen Marciæ Naſh relictæ Thomæ Naſh nuper de Feringe in com' Eſſex defunct' remiſit, relaxavit, & omnino pro ſe hæred' executorib' & adminiſtr' ſuis imperpetuum quiet' clam' præf. Thomæ Naſh filio & hæred' prædict' Tho' Naſh quondam viri ipſius Marciæ per nomen Tho' Naſh de Whethersfield in com' præd' Yeoman, filii & hæred' dicti Thomæ nuper viri ſui, omnes & omnimod' actiones, tam reales quam perſonales, ſectas, querelas, & demanda quæcunque quæ ipſa Marcia vel execut' ſui vers' præfat' Thomam Naſh filium vel executores ſuos unquam habuiſſet ſeu habuiſſent, tunc habuit vel habuerunt, ſeu quoviſmodo tunc in futuro habere potuiſſet vel potuiſſent ratione alicuj' rei, cauſæ, vel facti cujuſcunque, ab origine mundi uſque diem dat' ejuſdem ſcripti relaxationis, poſt quod quidem ſcriptum relaxationis præfat' Thomæ filio per prædict' Marciam, ut præfertur, fact' prædictus Thomas filius de præd' reverſione tenementorum prædictorum cum pertinen' unde &c. In forma prædicta ſeiſit' exiſten', apud Gosfield præd' obiit de tali ſtatu ſuo inde ſeiſitus, poſt cujus mortem ead' reverſio tenemen' præd' cum pertin' unde &c. Deſcendebat præfat' Margaretæ ut filiæ & hæredi prædict' Thomæ filii, per quod eadem Margareta fuit ſeiſit' de eadem reverſione tenementorum prædictorum cum pertin' unde &c. ut de feodo & jure, ipſaque Margareta ſic de reverſione illa, ut præfert', ſeiſit' exiſten', ac prædicto Zacharia de tenementis prædictis cum pertin' unde &c. In forma præd' ſeiſit' exiſt' idem Zacharias poſtea apud Gosfield prædictam obiit de tali ſtatu ſuo inde ſeiſit', poſt cujus mortem ead' Margareta in ten'ta prædict' cum pertin' unde &c. Intravit & fuit inde ſeiſita in domin' ſuo ut de feodo. Et ſic inde ſeiſit' exiſten' ead' Margareta poſtea & ante diem impetrationis' brevis orig' præd' Tho. Lawrence & Marciæ apud Gosfield præd' cepit in virum præd' Edw' Altham, per quod iid' Edw' & Margareta

fuerunt

fuerunt & adhuc ſunt ſeiſiti de tenementis pertin' cum pertin' unde &c. in dominico ſuo ut de feodo in jure ipſius Marg'. Et hoc parat' ſunt verificare: unde pet' judicium ſi præd' Tho' Lawrence & Marcia dotem ipſius Marc' de tenementis præd' cum pertin' unde &c. Ex dotatione præd' Tho. Naſh quondam viri &c. verſus eos habere debeant &c. Et præd' Tho. Lawrence & Marcia pet' auditum præd' ſcripti relaxationis, Et eis legit' in hæc verba: Omnibus Chriſti fidelibus ad quos hoc præſens ſcriptum pervenerit Marcia Naſh, relict' Thomæ Naſh nuper de Feringe in comitat' Eſſex defunct', ſalutem in Domino ſempiternam: Sciatis me præf' Marciam in pura viduitate & plena poteſtate mea exiſten' remiſiſſe, relaxaſſe, & omnino de & pro me hæred' executoribus & adminiſtr' meis imperpetuum quiet' clamaſſe, Tho. Naſh de Wethersfield in comitatu prædict' yeoman filio & hæred' dicti Thomæ nuper viri mei, omnes & omnimodas action', tam reales quam perſonales, ſectas, querelas, & demanda quæcunque, Necnon totam dotem meam ac titulum & actionem dot' mihi contingent' per mortem dicti Thomæ viri mei de aliquibus terris & tenementis ſuis in Wethersfield prædict' quæ vel quas ego præfata Marcia vel executores mei verſus ipſum Thomam Naſh filium vel executores ſuos unquam habui, habeo, ſeu quoviſmodo in futuro habere potero, habemus, vel habere poterim', ratione alicuj' rei, cauſæ, vel facti cujuſcunque ab origine mundi uſque diem datus hujus præſentis ſcripti relaxationis: Et inſuper noverit' me præfat' Marciam dediſſe & remiſiſſe eidem Thomæ Naſh filio omnia hujuſmodi bona nuper dicti Thom' viri mei quæ fuerunt' in poſſeſſione ipſius Thom' filii vel Aſſign' ſuorum temp' confectionis hujus cartæ relaxationis. In cujus rei teſtimon' huic præſenti ſcripto meo ſigil' meum appoſui. Datum viceſ' ſeptimo die Aprilis anno Regni dominæ noſtræ Eliz' dei gratia Angliæ, Franciæ, & Hiberniæ, Reginæ, fidei Defen' &c. triceſimo quinto. Quo lecto & audit' iidem Thom' Lawrence & Marcia dic', quod ipſi per aliqua præallegat' ab dote ipſius Marciæ habend' præcludi non debent, quia dic', quod prædictus Thomas Naſh quondam vir &c. in vita ſua, ac tempore mortis ſuæ, fuit ſeiſitus tam de tenementis prædictis cum pertinentiis unde &c. in Gosfield prædict', quam de duobus Meſſuagiis & ducentis acris terræ cum pertinen' in Wethersfield prædict' in dominico ſuo ut de feodo. Et ſic inde ſeiſit' exiſten' apud Gosfield prædict' per ultimam voluntat' ſuam in ſcriptis legavit ten'ta præd' cum pertinen' unde &c. In G. præd' præfat' Zachariæ Naſh, juniori filio juſdem T. Naſh, quondam viri &c. Ac poſtea apud G. prædictam

dictam obiit: poſt cuj' mortem præd' Thomas Naſh junior, ut filius & hæres præd' Tho. Naſh quondam viri &c. In tenementa prædicta cum pertinentiis in Wethersfield præd' intravit, & fuit inde ſeiſit' in Dominico ſuo ut de feodo. Et prædict' Zacharias in tenementa præd' cum pertinentiis unde &c. In Gosfield præd' intravit, & fuit inde ſeiſitus in dominico ſuo ut de libero tenemento pro termino vitæ ſuæ: Et iidem Thom' Lawrence & Marcia ulterius dicunt, quod tempore mortis præd' Tho. Naſh quondam viri &c. prædict Zacharias fuit infra ætatem viginti & unius annorum (videlicet) trium annorum, per quod præd' Marcia, dum ipſa ſola fuit, ut gardian' & pro nutritura ejuſdem Zachariæ in tenementa præd' cum pertinentiis unde &c. In Gosfield præd' intravit, & fuit inde poſſeſſionat' prædictoque Thoma Naſh filio de tenementis prædictis cum pertinentiis in Wethersfield præd' ſeiſit' exiſten', Ac prædicto Zacharia de tenementis prædictis cum pertinen' unde &c. In Gosfield prædict' in forma prædicta ſeiſit' exiſten', Ac eadem Marcia inde in form' præd' poſſeſſionat' exiſten', poſtea, & ante confectionem præd' ſcripti relaxationis hic in Cur' prolat', apud Gosfield præd', concordat' & agreat' fuit inter eandem Marciam dum ipſa ſola fuit, & prædict' Thomam Naſh filium, quod eadem Marcia relaxaret eidem Thomæ Naſh filio totam dotem ſuam ſibi contingen' per mortem præd' Thomæ Naſh quondam viri &c. De omnibus terris & tenementis ejuſdem Thomæ in Wethersfield prædicta, Et quod prædictus Thomas Naſh, filius feoffaret quoſdam Johannem Tyler ſen' Johannem Tyler juniorem & hæredes ſuos de tenementis prædictis cum pertinentiis unde &c. In Gosfield prædicta ad uſum prædicti Zachariæ & hæred' de corpore ſuo legitime procreat'. Et iidem Tho. Lawrence & Marcia ulterius dicunt, quod prædictus Tho. Naſh filius de tenementis præd' cum pertinentiis in Wethersfield prædict' in forma prædicta ſeiſitus exiſtens, & prædicta Marcia de tenementis prædict' cum pertinen' unde &c. In Gosfield prædicta poſſeſſionat' exiſten' eadem Marcia poſtea, ſcilicet, prædicto viceſimo ſeptimo die Aprilis anno Regni dictæ Dominæ Elizabethæ, nuper Reginæ Angl' Triceſimo quinto ſupradicto dum ead' Marcia ſola fuit, apud Gosfield prædictam prædictum ſcriptum relaxationis præfat' Thomæ Naſh filio ſigillavit & deliberavit, Ac prædictus Thomas Naſh filius viceſimo octavo die Apr' anno Regni dictæ nuper Reginæ triceſimo quinto ſupradicto apud Goſfield præd' feoffavit præfat' Johannem Tyler ſeniorem & Johannem Tyler juniorem & hæredes ſuos de tenementis prædict' cum pertinentiis unde &c. In Gosfield prædicta

ad

ad uſum prædicti Zachariæ & hæred' de corpore ſuo legitime procreat', ac poſtea idem Zacharias apud Gosfield præd' obiit ſine hærede de corpore ſuo legitime procreat': Et hoc parati ſunt verificare: unde petunt Judicium & ſeiſinam de tertia parte tenementorum prædictorum cum pertin' unde &c. In Gosfield prædicta ſibi adjudicari, &c. Et præd' Edwardus & Margareta dic', quod præd' placitum præd' Tho. Lawrence & Marciæ modo & form' præd' ſuperius replicand' placitat' materiaque in eodem content' minus ſufficien' in lege exiſtunt ad ipſos Thomam & Marciam ad dotem ipſius Marcia de tenementis prædictis cum pertin' unde &c. Verſus eoſdem Edwardum & Margaretam habend' manutenend', ad quod ipſi neceſſe non habent nec per legem ter' tenentur reſpondere: Et hoc parat' ſunt verificare: Unde pro defectu ſufficien' replication' prædict' Thomæ Lawrence & Marciæ in hac parte iidem Edwardus & Margareta ut prius petunt Judicium: Et quod præd' Tho. Lawrence, & Marcia a dote ipſius Marc' de tenemen' præd' cum pertin' unde &c. verſus eos habend' præcludantur &c.

Et præd' Tho. Lawrence & Marcia, ex quo ipſi ſufficien' materiam in lege ad ipſos Thom' & Marciam ad actionem ſuam præd' verſus præd' Edward' & Margaretam habend' manutenend' ſuperi' replicando allegaverunt quam ipſi parat' ſunt verificare, quam quidem mater' præd' Edward' & Margareta non dedic' nec ad eam aliqualit' reſpond' ſed verificationem illam admittere omnino recuſant, ut prius pet' Judicium & ſeiſin' de tertia parte præd' ſibi adjudicari &c. Et quia Juſtic' hic ſe adviſare volunt de & ſuper præmiſſ. priuſquam Judicium inde reddant, dies data eſt partibus præd' hic uſque in octab' ſancti Mich. de audiend' inde Judicio ſuo, eo quod iidem Juſtic' hic inde nondum &c.

Mich.

Mich. 8 Jacobi Regis.

EDWARD ALTHAM's *Case.*

1 Brownl. 62, 63. 10 Co. 51. a.

THomas *Lawrence*, and *Marcy* his Wife, brought a Writ of Dower againſt *Edw. Altham*, and *Margaret* his Wife, and made Demand to be endowed of the third Part of 100 Acres of Land, 10 Acres of Meadow, and 60 Acres of Paſture, with their Appurtenances, in *Goſfield*, in the County of *Eſſex*, as the Dower of the ſaid *Marcy*, of the Endowment of *Thomas Naſh* the elder, her late Huſband: The Tenants pleaded in Bar, that the ſaid *Thomas Naſh* was ſeiſed of the Tenements aforeſaid in Fee, and held them in Socage, and afterwards 10 *Aprilis* 1592, by his Will in writing deviſed the ſaid Tenements whereof, *&c.* to *Zachary Naſh* his younger Son for the Term of his Life, and afterwards died thereof ſeiſed, after whoſe Death the ſaid *Zachary* enter'd, and was thereof ſeiſed for the Term of his Life, and the Reverſion of the ſame Tenements deſcended to *Tho. Naſh* Son and Heir of the ſaid *Thomas* the Husband, and afterwards the ſaid *Marcy* one of the Demandants in her Widowhood when ſhe was ſole, *ſcil'* 27 *Aprilis* 35 *Eliz.* by her Deed did remiſe, releaſe, and for her, her Heirs, Executors and Adminiſtrators, for ever quit claim to the ſaid *Thomas Naſh* the Son, *omnes & omnimodas Actiones, tam reales quam perſonales, Sectas, Querelas & Demanda quæcunque quæ ipſa Marcia vel Executores ſui verſus præfat' Thomam Naſh Filium vel Executores ſuos unquam habuiſſet ſeu habuiſſent, tunc habuit vel habuerunt ſeu quoviſmodo tunc in futurum habere potuiſſet vel potuiſſent, ratione alicuj' rei, Cauſa vel Facti cujuſcunque ab Origine Mundi uſque Diem Dat' ejuſdem ſcripti Relaxationis*, And afterwards the ſaid *T.* the Son died ſeiſed of the ſaid Reverſion after whoſe Death it deſcended to the ſaid *Margaret*,

Margaret, Wife of the ſaid *Edw. Altham*, the other of the Tenants, and afterwards the ſaid *Zachary* died, and the ſaid *Margaret* enter'd, *&c.* And the Demandants demanded Oyer of the ſaid Deed, which was read to them in theſe Words, *Omnibus Chriſti fidelibus ad quos, &c.* as in the Record here before at large. And the Demandants reply'd and ſaid, That the ſaid *Tho. Naſh* the Father was ſeiſed in his Demeſn as of Fee, as well of the Tenements whereof, *&c.* in G. aforeſaid as of two Meſſuages, and 200 Acres of Land in *Wetherfield* aforeſaid, and by his Will in writing deviſed the ſaid Tenements whereof, *&c.* In G. to the ſaid *Zachary Naſh* as is aforeſaid, and afterwards died, after whoſe Death the ſaid *T. Naſh* the Son entred into the ſaid Tenements in *Wetherfield* as Son and Heir, and was ſeiſed thereof in Fee, and the ſaid *Zachary* enter'd into the ſaid Lands in *Goſfield*, *&c.* And that the ſaid *Zachary* was at the Time of the Death of the ſaid *Tho.* the Father, of the Age of three Years, wherefore the ſaid *Marcy*, as Guardian by Nurture, enter'd into the ſaid Tenements in G. and that afterwards and before the ſaid Releaſe, it was concluded and agreed by the ſaid *Marcy*, when ſhe was ſole, and the ſaid *Tho. Naſh* the Son, That the ſaid *Marcy* ſhould releaſe to the ſaid *Tho. Naſh* the Son all her Dower of the Tenements in *W.* aforeſaid, *&c.* and that the ſaid *Thomas* the Son ſo ſeiſed of the Tenements in *W.* and the ſaid *Marcy* ſo poſſeſſed of the Tenements in G. ſhe made the ſaid Releaſe, *&c.* and afterwards the ſaid *Zachary* died, *&c.* upon which the Tenants demurr'd in Law. And in this Caſe two Queſtions were moved and argued at the Bar and Bench. The firſt was, whether the ſaid Releaſe made by the Wife to him in Reverſion expectant on an Eſtate for Life, ſhou'd extinguiſh her (*a*) Dower? The 2d, whether the ſaid foreign Concord and Agreement of the Parties ſhou'd qualifie the Force of any of the Words of the Releaſe. As to the firſt, The ſaid Deed of Releaſe was divided into 3 parts; in the firſt was conſider'd the Words of the Releaſe; in the ſecond, the Words of Qualification; and in the 3d, the Words of Relation. As to the Words of the Releaſe they appear to be of two Sorts, the one general, the other ſpecial: The general contains 4 Words, *Actiones, Sectas, Querelas & Demanda*: The ſpecial contains three, *Dotem, Titulum, & Action' Dotis*: The Words of Qualification are, *Mihi contingent' per mortem dicti Thomæ nuper viri mei, de aliquibus terris & tenementis ſuis in W. præd'.* The Words of Relation or Relative Words are, *quæ vel quas ego præfat' Marcia, vel executores mei verſus ipſum Tho. &c. unquam habui, habeo, ſeu quoviſmodo in futurum habere potero ratione alicujus rei, &c.* As to the firſt word (*Actiones,*) It was reſolv'd, That in this Caſe the Releaſe of all Actions real to *Tho.* the Son, having but a Reverſion expectant on a Freehold did not extinguiſh the Dower, becauſe (*b*) *Actio eſt jus proſequendi in judicio quod alicui debet'* as it is

(*a*) 1 Co. 112. b. Co. Lit. 265. a. 5 Co. 71. a. 16 E. 3. Bar. 245. Poſtea 151. b. 154. a. Doct. pla. 149.

(*b*) Co. Lit. 285. a. Dyer 217. pl. 2. 10 Co. 51. b. Poſtea 52. a. 2 Init. 40.

described in (a) *Dyer* 4 & 5 *Ph. & Mar.* 217. out of *Bracton*, *lib.* 3. *cap.* 1. And the Wife can't sue *Tho.* the Son, to recover her Dower by Judgm. because he is not Ten. to the *Præcipe*, nor can render Dower to her, for at the Time of the Release *Zachary* was Ten. of the Freeh. and *Litch. Release fo.* 115. holds, That in Actions real, which (b) ought to be sued against the Ten. of the Freeh. if the Ten. has a Release of Actions real of the Demandant made to him before the Writ purchased, and he pleads it, It is a good Plea for the Demand. to say, that he who pleads the Plea had nothing in the Freeh. at the time of the Release made, for then he had no Cause to have any Action real against him. And therefore *Coke C. J.* said, the Opinion in 14 *H.* 6. 11. *a.* was of great Difficulty, *&c.* If one releases to him in the Reversion expectant on an Estate for Life all Actions real, and afterwards Tenant for Life is impleaded, and prays in Aid of him in Rever. or vouches him, or he is receiv'd in these Cases (as it is there said) altho' the *Præcipe* be not begun against him, yet forasm. as by the Receipt or Voucher, he is become Tenant to the *Præcipe* of him who made the Release, and shall be bound by the Judgm. he shall have Advantage to plead the Release of all Actions real: But the Doubt is, because at the time of the Release made he had no Cause (as *Lit.* saith) to have any Action against him: But doubtless after Receipt or Entry into the Warranty by the Vouchee, a Release by the Demandant to the Tenant by Receipt, or the (c) Vouchee, is good, because both at the Time of the Release made were Tenants in Law to the Demandant, but a Release to them by any Stranger is not good: *Vide* 7 *E.* 3. 46. 18 *E.* 3 12. 8 *H.* 4. 5. *a.* 7 *E.* 4. 13. *b.* 20 *H.* 6. 29. 22 *H.* 6. 12. 5. *H.* 7. 41. *a. Litt.* 114. *b. Lib.* 1. *in my Reports, fol.* 87. *& lib.* 3. *fol.* 29. But if the Wife had released *totum jus*, all her Right to him in the Reversion, her (d) Dower had been extinct, because her Dower would accrue to the Demandant, not only out of the Estate for Life, but also out of the Reversion, and that was affirmed for good Law, as well at the Barr by both Parties, as at the Bench, according to the Book of (e) 16 *E.* 3. *cited in Hoe's Case, in the* 5 *Part* of *my Reports, fol.* 70, 71. *a.* For when the Right which is the Foundation and Principal is released by Consequence the Action, which is but the Mean to recover it, *i. Jus prosequendi*, is also released: and that appears in 9 *H.* 6. 47. 10 *H.* 4. 6. 21 *H.* 7. 23. 19 *H.* 6. 4. and therefore *Jus* is well divided in *Plow' Com'* in *Nichols* Case 487. *b.* where it appears that *Jus est sextiplex, scil.* 1. (f) *Jus recuperandi, i. e. prosequen'*: 2. *Jus intrandi*: 3. *Jus habendi*: 4. *Jus retinendi* 5. *Jus percipiendi*: 6. *Jus possidendi*: and therefore when a Man releases *totum Jus* generally all his Rights are thereby released. But if the (g) Disseisee releases to the Disseisor, *omnes Action', i. Jus recup' sive prosequen' in Judic'*, his Right of Entry is not

(a) 4 & 5 Eliz. Dyer 217. pl. 2. Moor 34. Postea 153. b. 1 Anders. 8. 5 Co. 91. a. N. Benl. 126. pl. 190. Co. Ent. 115. pl. 5.

(b) Lit. Sect. 495. Co. Lit. 286. a. Lit. fo. 116. a.

(c) 3 Co. 29. b. Hob. 222. 1 Co. 87. b. Lit. Sect. 191. fo. 115. b. Co. Lit. 265. b. 284. b. 10 Co. 48. b. 9 H. 7. 26. a. 7 E. 4. 13. b. 2 Rolls Rep. 323. Br. release 9, 43, 53. 20 H. 7. 10. a.

(d) Antea 151. a. 1 Co. 112 b. Co. Lit. 265. a. 5 Co. 71. a. 16 E. 3. Fitz. Bar. 245. Postea 154. a. Doct. pla. 149.

(e) Fitz. Bar. 245.

(f) Co. Lit. 345. b.

(g) 4 Co. 63. a.

thereby releaſed: For when a Man has (a) divers Means to come to his Right, he may releaſe one of them ſpecially, and yet take Benefit of the other; and therewith *Littl.* agrees *fol.* 115. *b.* and 19 *Aſſ. p.* 3. 19 *H.* 6. 4. 21 *H.* 6. 23. 21 *H.* 7. 23. But when a Man has not any Means to come to the Land (b) but by way of Action, there if he releaſes all Actions, thereby his Right incluſive by Judgment of Law is gone, becauſe by his own Act he has barred himſelf of all Means and Remedies to recover or attain to it: For a Releaſe of all Advantages upon the Account is a good Barr in an Action of Debt upon the Account, 9 *E.* 4. 49. And therefore if the Diſſeiſee releaſes all Actions (c) to the Heir of the Diſſeiſor, thereby his Right in Judgment of Law is gone. But if the Heir of the Diſſeiſor makes a Leaſe for Life, the Remainder in Fee, and the Diſſeiſee releaſes to the (d) Tenant for Life all Actions which he has againſt him, and afterwards Tenant for Life dies, the Diſſeiſee notwithſtanding this Releaſe ſhall have an Action againſt him in Remainder, for he releaſes but the Action, and the Act in Law never extends the Act of the Party farther than his expreſs Words, as if the Lord diſſeiſes his Tenant, and makes a Leaſe for Life, this Releaſe in Law ſhall be but for the Life of the Leſſee, for it is true, that (e) *Fortior & potentior eſt diſpoſitio Legis quam hominis*, and ſo it is true, that (f) *Fortior & æquior eſt diſpoſitio Legis quam hom'.* (g) *Ipſæ etiam Leges cupiunt ut jure regantur.* But if the Diſſeiſee releaſes all Actions to the Diſſeiſor, and afterwards the Diſſeiſor dies ſeiſed, (h) and afterwards the Diſſeiſee dies, there a Right deſcends to the Heir of the Diſſeiſee, becauſe notwithſtanding the Releaſe, a Right remained. *Vide* (i) 21 *H.* 6. 1. the Opinion of *Newton:* And it was obſerved, (k) *Actio eſt Jus Proſequendi in Judicio*, and therefore by the (l) Judgment the Action is determined, for the Judgment is the End of the Action (*jus proſequendi in judicio*) and therefore a Releaſe of all Actions is no Bar (m) of Executions; and therewith agrees 26 *H.* 6. *Execution* 7. and *Br. Releaſes* 87. and 19 *H.* 6. 4. and *Littl.* 116. *b.* But in a (n) *Scire facias* grounded upon a Judgm. a Releaſe of all Actions is a good Plea, becauſe he ſhall have a new Judgment; and therefore there it may be well call'd *jus proſequen' in judic'* and therewith agrees, 18 *E.* 4. 7. *b.* Then the Words farther are, *quod alicui debetur, i.e.* which is due to any, ſo that by releaſe of all Actions (o) real and perſonal, ſuch Actions are only releas'd in which the Pl. ſhould recover any Thing in the Realty or the Perſonalty which is due to him, which is included in theſe Words, *quod ſibi debetur.* And therefore if a Man is outlawed in a perſonal Action by Proceſs upon the Original, and brings a Writ (p) of Error, and he pleads againſt him a Releaſe of all Actions perſonal, that is no

(a) Co. Lit. 286. b. 4 Co. 63. a. Lit. Sect. 496. fo. 116. a. b.
(b) Co. Lit. 280. a.
(c) Co. Lit. 286. a.
(d) Co. Lit. 275. b. 285. b.
(e) 10 Co. 67. b. 6 Co. 64. a. 2 Rolls Rep. 315. Hutt. 18. 2 Siderf. 59.
(f) Co. Lit. 338. a. 6 Co. 69. b.
(g) 2 Co. 25. b. 5 Co. 100. a. 9 Co. 123. b.
(h) Co. Lit. 10. a. 143. a. 166. b. 174. b. 271. b.
(i) 10 Co. 51. b.
(k) Antea 151. a. Co. Lit. 285. a. Dyer 217. pl. 2.
(l) Co. Lit. 289. a.
(m) Poſtea 153. a.
(n) Co. Lit. 290. b. Lit. Sect. 505. Br. Scire fac' 188. Br. releaſe 57.
(o) Co. Lit. 288. b.
(p) Co. Lit. 288. b. Lit. Sect. 503.

Plea; for by the ſaid Action he ſhall recover nothing that is due to him, but he ſhall only reverſe the Outlawry to diſcharge himſelf of that Diſability. So that the ſaid Writ of Error doth not agree with the ſaid Deſcrip. of an Action; for it is not (*a*) *jus proſequen' in judic' quod ſibi debet'*: But in ſuch Caſe a Releaſe of Writ of Error is a good Plea: and therewith *Littleton* agrees, 116 *b.* and the Book in (*b*) 11 *Hen.* 4. 6. *a. b.* where the Caſe was, *Treſcullard* brought a Writ of Error againſt *T.* Son and Heir of *John Penros*, upon a Judgm. againſt him in a Writ of Rediſſeiſin, at the Suit of the ſaid *J. Penros*, and alſo of an Outlawry thereup. againſt him pronounc'd for that Cauſe, and aſſigned 2 Errors, one becauſe the Sheriff took the Enqueſt in the Town, and not on the Land, according to the Statute. 2. Becauſe the Sheriff made a Precept to a Baily to ſummon the Jury, who returned a Pannel, which was remov'd hither as Parcel of the Record and the Sheriff took the Enqueſt by ſome who were not returned by the Baily. And there *Huls*, as to the firſt Error ſaid, if the Sheriff cauſe the Jury to view the Waſte, he may take the Enqueſt at another Place, ſo here. And as to 2 Error he ſaid, That the Sheriff may vary from the Return of the Baily; for the Sheriff himſelf is the Perſon who makes the Array, who is alſo a Judge in the Caſe: *Gaſcoign*, If the Sheriff had not made the Precept, and the Return by the Baily had not been made Parcel of the Record it wou'd be as you ſay; but he has ſent this Return as Parcel of the Record whereby he affirms the Return of the Baily; and if he had made Proceſs againſt the Jury by *Hab. cor.* and had taken the Enqueſt by others, 'tis Error, *quod Huls conceſſit*: and *Rolfe* of Coun. with the Def. in the Writ of Error pleaded, that the Pl. ſhould not be receiv'd to aſſign Error, for after the Judgm. the Pl. in the Writ of Error, by his Deed which is here, releaſed to the ſaid *J. Penros* who recovered in the Writ of Rediſſeiſin all his Right in the Land, and all Actions and Demands; and altho' both the Errors were aſſigned in the principal Record and thereof by the ſaid Releaſe he is ſtopped to aſſign Error, and altho' the Outlawry was good in Proceſs, yet becauſe the Record and Judgm. are the Original of the Proceſs of the Outlawry; therefore if there be Defect in the original Judgm. the Outlawry which is depending upon it is reverſible by *Gaſcoigne*, *quod Huls affirmavit*: wherefore he revers'd the Utlagary, notwithſtanding the Releaſe. Which Judgm. agrees with *Lit.* and is worthy Obſervation in the principal Point of Judgm. So if the Body of a Man condemned in Debt be in Execution, and the Pl. releaſes the Debt, and all Executions, and the Def. releaſes to the Pl. all Actions, yet upon the Releaſe of the Pl. he ſhall have an (*c*) *Audita querelâ*; for thereby he ſhall recover nothing, but diſcharge his Body of Impriſonment.

(*a*) Co. Lit. 288. b. Lit. 317. b. Lit. Sect. 503.

(*b*) Poſtea 154. a. Fitz. Error 64. Antea 143. a. Br. Error 47.

(*c*) Co. Lit. 285. a.

But if the Pl. after Judgment releaſes to the Defendant all Actions, and afterwards his Body is taken in Execution, he ſhall not have an *Audita querela* thereupon, for (*a*) an Execution is no Action, as has been ſaid before; and therewith agrees 13 *H.* 4. *Releaſe* 53. Alſo it was obſerved, upon theſe Words (*quod alicui debetur*) That in ſome Caſe a Debt or (*b*) Duty ſhall be barred by a Releaſe of (*c*) all Actions, altho' no Action at that Time lies for the Debt: As if a Man be bound to another in a certain Sum to be paid at the Feaſt of Saint (*d*) *Michael* next following, if the Obligee before the Feaſt releaſes to the Obligor all Actions, he ſhall be barred for ever of the Duty, for it it is * *debitum* preſently, altho' it be not preſently *ſolvend'*: And therefore if one be bound to another in 40 *li.* to be paid at 4 uſual Feaſts of the Year, and three of the Feaſts are paſt, in that Caſe for 30 *li.* there is *debitum* and *ſolvend'* alſo, and yet the Obligee ſhall not have an Action of Debt (*e*) till the laſt Feaſt be paſt, and notwithſtanding that a Releaſe of all Actions before the laſt Feaſt diſcharges all; (*f*) But if a Man leaſes Land to another for the Term of a Year, rendring 40 *li.* Rent, to be paid at the Four uſual Feaſts by equal Portions, in this Caſe if one Feaſt be paſt, he ſhall have an Action of Debt preſently, and ſhall not tarry till all the Days be paſt, for there the Duty accrues upon the receiving of the Profits of the Land, and till the Feaſt incurred in which it is to be paid, there is neither *debitum* nor *ſolvend'*, and theref. there a Releaſe of all Actions before the Feaſt is no Bar, but in Reſpect of the ſev. Perception of the Profits of the Land, the Rent aft. every Feaſt is demandable by Action of Debt: And ſo *ſtude Cauſam Diverſitatis* made in (*g*) *Littl.* 117. (which was never added by *Litt.* himſelf) is well explain'd. And therew. agree, 7 *H.* 6. 26. *a.* 45 *E.* 3. 8. *a. L.* 5 *E.* 4. 41. *b.* 13 *H.* 4. *Avowrie* 240. *Vide* 3 *Ma. Dyer* (*h*) 113. 5 *Ma.* (*i*) *Dyer* 108. upon *Aſſumpſit* or Covenant in which Damages are to be recover'd an Action lies after the 1 Day, & *F. N. B.* 267. & 16 *E.* 3. *Fieri fac.* 4. That upon (*h*) a Recognizance which is a Judgm. in Law, Execution lies after the 1 Day, and ſo all the Books are well reconciled and agreed; wherefore it was concluded in the Caſe at Bar, That by the Releaſe of all Actions made to him in Rever. the Dower of the Wife was not barr'd, becauſe at the Time of the Releaſe ſhe had no Cauſe of Action againſt him. As to this Word (*Querelas*) (*l*) it is to be known, that *Quarrels* extend not only to Actions as well real as perſonal, as it is held in 9 *E.* 4. 44. *a.* but alſo to (*m*) Cauſes of Action and Suits, as it is held in 39 *H.* 6. 9. *b.* So that by Releaſe of all *Quarels*, not only Actions depending in Suit, but Cauſes of Action and Suit alſo are releaſed. And ſo it is where one releaſes to another all Actions, not only Actions depending, but alſo (*n*) Cauſes of

(*a*) Lit. Sect. 504. Co. Lit. 285. a.
(*b*) Cr. El. 370.
(*c*) Co. Lit. 285. a.
(*d*) 1 Brownl. 62.
* 1 Bulſtr. 67. 178. Co. Lit. 292. b.
(*e*) 1 Brownl. 62, 63. 5 Co. 81. b. Co. Lit. 47. b. 292. b. F. N. B. 131. a. 10 Co. 128. b. 2 Leon. 107, 108, 131. Ow. 42. F. N. B. 130, 131, h. Benl. in Aſh. pl. 10. O. Benl. 3. pl. 8. Yelv. 67. Cr. Eliz. 118, 119, 776, 807. 4 Co. 94. b. N. Benl. 57. pl. 93. 3 Leon. 4. 4 Leon 13. Moor 13. Benl. in Kelw. 208, 209. 3 Co. 22. a. Cr. Car. 241. Cr. Jac. 505. 2 Sand. 337. 1 Rolls 29, 601. 1 Rolls Rep. 221. 2 Rolls Rep. 47. Br. Action Sur le Caſe 108. in fine. 1 Leon 300.
(*f*) 1 Brownl 62. 63. 5 Co. 81. b. Co. Lit. 47. b. 10 Co. 128. b. 2 Leon. 108. Owen 42. Cr. El. 118, 119. 3 Co. 22. a. 1 Rolls Rep. 221.
(*g*) Lit. Sect. 513. Co. Lit. 292. b.
(*l*) Co. Lit. 292. a. Lit. Sect. 511.
(*m*) Co. Lit. 292. a.
(*n*) Co. Lit. 285. a.
(*h*) Lit. 518. b.
(*i*) Dyer 123. pl. 53, 56.
(*k*) Br. Action ſur le caſe 108. 1 Leon 300.
(*n*) Co. Lit. 47. b. F. N. B. 130. h. 1 Rolls Rep. 221. Co. Lit. 292. b. Cr. Jac. 505.

10 Co. 128. b. 2 Inſt. 395. F. N. B. 267. b.

of (*a*) Actions are releaſed. *Vide* 35 *H.* 8. 57. 4 & 5 *Phil.* & *Mar.* (*c*) 217. *b. Trinit'* 4 *Eliz. Rot.* 1027, *&c.* And this Word *Querela* is deriv'd a *querendo, unde etiam Querens* who is the Pl. and *Quarels*, Controverſies and Debates, are (*d*) *Synonima*, and of one and the ſame Signif. And for this Word (*Sectas*) it is to be known that by Releaſe of all (*e*) Suits, Executions are barr'd for none ſhall have Execut. without Suit or Prayer; and therewith agree, 9 *H.* 6. 4. 26 *H.* 6. *Execution* 7. and *Br. Releaſes* 87. So by Releaſe of all (*f*) Duties, as well Executions as Actions are releaſed. But a Releaſe of Suit or Quarrel is not in this Caſe any Barr of Dower, no more than by a Releaſe of them, a (*g*) Cov't before the Breach thereof is releas'd, becauſe the Covenantee has no Cauſe of Action or Suit before the Cov't broke. As to this Word (*h*) (*titulum*) (which is mentioned in the particular Clauſe) it has 2 Significations one properly and ſtrictly, as for a Title for which no Action lies, as for a Condition broke, or upon Alienation in Mortmain, *&c.* and ſo it is taken in *Plow' Com'* in *Nichols Caſe, fol.* 484. In another Signification it is taken largely, and in this Senſe, *Titulus eſt juſta cauſa poſſidendi quod noſtrum eſt*, and ſignifies the Title which one has to Land, as by Fine, Feoffment, *&c.* or by Deſcent, *&c.* and therefore when the Pl. makes a Title in an Aſſize, the Tenant may ſay, let the Aſſize come upon the Title, which is as much as to ſay, upon the particular Conveyance, *&c.* which he makes to the Land, *&c.* and it is called (*k*) *Titulus a tuendo, quia* thereby he defends his Land, *& plerumque conſtat ex munimentis quæ muniant & tuentur cauſam.* By Releaſe of all Title to Land, *&c.* all his Right is extinct, for it ſhall be taken ſtrongly againſt him, and in the largeſt Senſe. So when a Man has Title in the proper Senſe, (*l*) either by a Condit. or by Alienation in Mortmain, the Releaſe of all his Right will extin. this Title, for he has *Jus Poſſidendi*, and therew. agrees 6 *H.* 7. 8. *a.* And the *Engliſh* Poet ſaith, *For true it is, that neither* (*m*) *Fraud nor Might, Can make a Title where there wanteth Right.* The laſt of the four general Words in the Deed is (*n*) (*demanda*) *quod eſt vocabulum artis:* And if one releaſes to another all Demands, it is (as *Littleton* ſaith, 117. *a.*) the beſt Releaſe to him to whom the Releaſe is made, that he can have, and ſhall enure moſt to his Advantage; for thereby not only all Demands, but alſo all (*o*) Cauſes of Demand, are releaſed. And there are (*p*) two manner of Demands, *ſcil.* in Deed, and in Law; in Deed; as in every *Præcipe* there is an expreſs Demand, and thereupon in real Actions he is called Demandant; in Law, as every Entry into Land, Diſtreſs for Rent, taking or Seiſure of Goods, and the like Acts in *Pais*, which may be done without any Words, are

(*a*) Co. Lit. 285. a.
(*b*) 10 Co. 51. b. Dyer 57. a. b. Co. Lit. 285. a.
(*c*) 1 And. 8. 4 & 5 Eliz. Dyer 217. pl. 2. 5 Co. 71. a. N. Benl. 126. pl. 190. Co. Ent. 115. pl. 5. Antea 151. b. Moor 34.
(*d*) Co. Lit. 292. a.
(*e*) Co. Lit. 291. a. 2 Rolls 404. 26 H. 6. Fitz. Execut. 7.
(*f*) 2 Rolls 404. Fitz. Execut. 7. Co. Lit. 291. a.
(*g*) Co. Lit. 292. b. 5 Co. 71. a. 1 Co. 112. b. 2 Rolls 404. 10 Co. 51. b. Cr. Jac. 170. Mo. 34. Hutt. 17. 2 Bulſtr. 231. 1 Anderſ. 8. Poph. 136. Lit. R. 87. Yelv. 156.
(*h*) Co. Lit. 345. b. 292.
(*i*) Co. Lit. 345. b.
(*k*) Co. Lit. 345. b.
(*l*) Co. Lit. 345. b.
(*m*) 1 Brownl. 63.
(*n*) 1 Brownl. 63, 80, 115. Co. Lit. 291. b. Lit. Sect. 508. Poph. 136. 2 Rolls Rep. 20. Cr. Jac. 170. 300, 486, 487. 2 Rolls 406, 407, 408. Bridg. 124, 125. 21 Aſſ. 5. Fitz. Releaſe 39. Br. Releaſe 36. Long. quinto E. 4. 42. a. 40 E. 3. 48. a. 34 H. 8. Br. Releaſe 90. Yelv. 214, 215. Hob. 216. Noy 26. Hutt. 17. 1 Bulſtr. 178.

Cr. El. 552. Lit. Rep. 87. 11 Co. 82. b. (*o*) 1 Brownl. 63. (*p*) Co. Lit. 291. b.

are Demands in Law. And as a Releaſe of Suits is (*a*) larger and more beneficial than a Releaſe of Quarrels, or of Actions; ſo a Releaſe of Demands is more large and beneficial than any of them, for thereby is releaſed all that is by the others releaſed, and more: By Releaſe of all Demands, all Freeholds and Inheritances executory are releaſed, as (*b*) Rents, and the like, 20 *Aſſ. p.* 5. 14 *H.* 8. 9, 10. By Releaſe of all Demands, all (*c*) Executions are releaſed, 26 *H.* 6. *Execution* 7. 19 *H.* 6. 4. *Litt.* 117. 40 *Edw.* 3. 51. by Releaſe of all Demands, to the Diſſeiſor, the Right of Entry to the Land, and all that is contained in it is releaſed, 6 *H.* 7. 15. So it is reſolved by all the Juſtices in (*d*) *Chauncy*'s Caſe, 34. *H.* 8. *Br. Releaſe* 90. that he who releaſes all Demands excludes himſelf from all Actions, Entries and Seiſures. *Litt. cap. Warranty* 170. *a.* holds, That if Tenant in Tail enfeoffs his (*e*) Uncle, who enfeoffs another in Fee with Warranty, if afterwards the Feoffee by his Deed releaſes to his Uncle all Manner of Warranties, or all Manner of real Covenants, or all Manner of Demands, by ſuch Releaſe the (*f*) Warranty (which is a Covenant real and executory) is extinct; and the Reaſon of all this was, becauſe by Releaſe of Demands, all the Means and Remedies, and the Cauſes of them, which any one has to Lands, Tenements, Goods, Chattels, *&c.* are extinct; and by Conſequence the Right and Intereſt it ſelf to the Thing. Wherefore it was reſolved, that in the Caſe at Barr by the Releaſe of all Demands to him in the Reverſion, if the Deed of Releaſe had not gone farther, the (*g*) Dower of the ſaid *Marcy* had been barred. Note, Reader, altho' a Releaſe of all Demands be of ſo great Extent, yet it doth not extend to ſuch Writs, by which nothing is demanded neither in Fact, nor in Law, but lie only to relieve the Plaintiff by Way of Diſcharge, and not by Way of Demand, as appears before, by the Judgment in (*h*) *Treſcullard*'s Caſe, in 11 *H.* 4. 6. where a Releaſe of all Demands is no Barr in a Writ of Error to reverſe an Outlawry, *Et ſic in ſimilib'* *Vide* 40 *E.* 3. 22. 13 *R.* 2. *Avow'* 39. 18 *E.* 3. 59. 14 *H.* 4. 4. *&c.* where by Releaſe of all Demands future (*i*) Incidents are releaſed, and where not. And *Vide Plow' Com'* 484. in *Nichols* Caſe for this Word (*intereſſe.*) Now as to the 2d Part of the Deed, *ſcil'* to the Words of Qualification, it was reſolved, That as well the firſt Words, as the ſubſequent Words ſpecial, extend only to releaſe all Actions, Suits, Quarrels, Demands, Title, and Dower, *&c. de aliquibus terris & tenementis ſuis in* Wethersfield. (*k*) and not to any Lands and Tenements in *Goſfield*, for the ſaid latter Words, *mihi contingent' per mortem dicti Thomæ*, &c. qualify the ſaid general Words and reſtrain all the firſt Words to the Lands or Tenements in *Wethersfield*,

(*a*) 1 Brownl. 63.
(*b*) Cro. Jac. 487. Bridgm. 124. Co. Lit. 291. b. 1 Brownl. 63. 2 Roll. 407.
(*c*) 1 Brownl. 63. Cro. El. 40. Lit. Sect. 508.
(*d*) 11 Co. 82. b. Co. Lit. 292. a.
(*e*) Co. Lit. 392. b. Lit. 171. a. Lit. Sect. 748.
(*f*) 1 Co. 112. b. 5 Co. 71. a.
(*g*) 1 Co. 112. b. 5 Co. 71. a. Antea 151. a. b. Co. Lit. 265. a. 16 E. 3. Fitz. Bar. 245. Doct. pla. 149.
(*h*) Antea 152. b.
(*i*) 1 Brownl. 63.
(*k*) 3 Keb. 580.

and that for three Reasons: 1. Because all the said three Parts of the Deed, *scil.* the Words of Release, the Words of Qualification, and the Words of Relation are but one Period and one Sentence; for this Conjunction (*necnon*) conjoins the general Words to the Words of Qualification, and the relative Words refer to all the Words, as (*a*) well general as special, and also to the Words of Qualification, as shall hereafter appear, and therefore the whole is but one and the same Sentence. 2. If the general Words should stand without any Qualification, then the special Words would be altogether vain and of no Effect, & (*b*) *male-dicta expositio est quæ corrumpit textum.* The third and the principal Reason is upon a Maxim and Principle of the Law, *sc.* (*c*) *Quando carta continet generalem clausulam, posteaque descendit ad verba specialia, quæ clausulæ generali sunt consentaneæ, interpretandæ est carta secundum verba specialia.* The same Rule almost Word for Word is put and agreed on both Sides in 7 *E.* 3. 10. *a. Margery* (*d*) *Mortimer's Case, sc. where a Deed speaks by general Words, and afterwards descends to special Words, if the special Words agree to the general Words, the Deed shall be intended according to the special Words:* As if a Man grants a Rent *in manerio de D' percipiend'* in 100 Acres of Land, Parcel of the same Manor, with Clause of Distress in the 100 Acres, the Rent shall issue out of the 100 Acres only, and the general Words shall be construed according to the special Words: So it is there also said, If a Man grants a Rent, (and goes no farther) these (*e*) general Words shall create an Estate for Life, but if the *Habendum* be for Years, it shall qualify the general Words; and all this appears in the said Book of 7 *E.* 3. So if a Man (*f*) gives Land to one and his Heirs, *Habendum* to him and the Heirs of his Body, he shall have but an Estate in Tail, and no Fee expectant; for the *Habendum* qualifies the general Words precedent; and therewith agree 35 *Ass. p.* 14. 37 *Ass. p.* 5. & *Perkins* 35. *b.* against the Opinion *obiter in* 21 *H.* 6. 24. But if a Man gives Lands in the Premises to one and (*g*) the Heirs of his Body, *Habendum* to him and his Heirs, he has an Estate tail, and a Fee-simple expectant; for that stands upon another Rule or Principle in Law, *scil.* (*h*) *generalis clausula non porrigitur ad ea quæ antea specialiter sunt comprehensa:* And therefore when the Deed at the first contains special Words, and afterwards concludes in general Words, both Words as well general as special shall stand: And it is well said in 35 *H.* 8. *Dyer* 56. subsequent Words may qualify and (*i*) abridge, but not destroy the generality of the Words precedent. *Vide Dyer* 33 *H.* 8. *fol.* 50. 21 *Ass. p.* 10. & 2 *E.* 3. 33. *b.* To the last Part of the Deed, *scil.* the relative Words, (*quæ vel quas*, &c.) It was resolved, that they refer

(*a*) Wing. Max. 15.

(*b*) 1 Roll. Rep. 419. Wing. Max. 26. 2 Co. 24. a. 4 Co. 35. a. 8 Co. 56. b. 3 Bulstr. 105, 107. 108.

(*c*) Winch. 92. 2 Roll. Rep. 279.

(*d*) Lit. Rep. 345. Hob. 172.

(*e*) 2 Co. 24. 2. 55. a. Winch 92. Perk. Sect. 167, 174. Co. Lit. 183. a. 190. b.

(*f*) 2 Roll. Rep. 19, 23. 2 Roll. 66, 68. Godb. 272. 2 Sid. 78. Poph. 138. Lit. Rep. 260, 345. Perk. Sect. 170. 1 Brownl. 45. Co. Lit. 21. a. Cro. Jac. 476. Dyer 126. pl. 50. 1 Sid. 78. 3 Bulstr. 195.

(*g*) Lit. Rep. 345. Co. Lit. 21. a. 2 Jones 4.

(*h*) Antea 118. b. Raymond 330. Hawk's Max. 21. Styles 391. 2 Roll. Rep. 279. Lit. Rep. 345. 4 Co. 80. b. Hard. 108.

(*i*) Co. Lit. 299. a. 1 Sid. 137. Dyer 56. pl. 21.

refer as well to Actions, &c. and Demands, as to the ſpecial Words, for it wou'd be againſt Reaſon that they ſhould refer to general Words, which are more remote, and not to the Words of Qualification which are immediate, and next to them: And that is ſo clear and perſpicuous of it ſelf that it is not worthy any Argument, or Proof, to confirm it. For the ſecond Point of the Caſe it was reſolved, That the ſaid foreign or collateral Averment out of the ſaid Deed was not of any Force or Effect in Law; for every Deed conſiſts upon two Parts, *ſcil.* Matter in Fact, and upon the Conſtruction in Law. Matter of Fact is to be averr'd by the Party, and triable by the Jurors: The other, being Matter in Law, is to be diſcuſſed by the Judges of the Law, and *quemadmodum* (a) *ad quæſtionem facti non reſpondent Judices; ita ad quæſtionem juris non reſpondent Juratores.* And therefore if *A.* levies a Fine to *William* his Son, to have and to hold to him and his Heirs, upon this Fine the Judge can't make Queſtion for any Matter of Law; but now the Party comes and averrs Matter in Fact; and ſaith, That *A.* had two Sons named *William*, (b) an elder, and a younger, and his Intent was to levy the Fine to *William* the younger; this (c) Averment out of the Fine is good of this Matter of Fact, which well ſtands with the Words of the Fine, and ſhall be tried by the Country; and therewith agrees 47 *E.* 3. 16. *b.* But if a Man by Deed gives Goods to (d) one of the Sons of *I. S.* who has divers Sons, here he ſhall not averr which Son he intended; for by Judgment in Law upon this Deed, this Gift is void for the Incertainty, which can't be ſupply'd by Averment. *Vide* 11 *E.* 4. 2. *a.* So if a Man levies a Fine of the Manor of *Soure*, or of the Manor of *Dirtleby*, to two *& Hæredib'*, and in Truth there is the (e) Manor of North *Soure* and South *Soure* or great *Dirtleby* and little *Dirtleby*, in this Caſe Iſſue may be taken *dehors* which Manor the Conuſor intended to paſs, for that is Matter of Fact not apparent in the Fine, whereof the Judge can't take Conuſans; but it ſtands well with the Fine, and ſhall be tried by the Jury, and therewith agree 12 *H.* 7. 7. 26 *H.* 8. 6. *a.* 19 *E.* 2. *Grants* 93. but where the Words are in the Limitation of the Eſtate to two (f) *& hæredibus*, that is apparent in the Fine, and by Judgment of Law, theſe Words *& hæredibus* are uncertain and void, as it is adjudged in 22 *H.* 6. 15. *b.* *Vide* 19 *H.* 6. 73. *b.* 20 *H.* 6. 35. *b.* 36. 22 *E.* 4. 6. *b.* and no Averment *dehors* can make that good, which upon Conſideration of the Deed is apparent to be void. So if a Man makes a Feoffment to one and his Heirs, no Averment can be taken that the Intent of the Parties was that the Feoffee ſhould have but an Eſtate to him and the Heirs of his Body, for

(a) 9 Co. 13. a. 25. a. 11 Co. 10. b. 2 Bulſtr. 204, 251, 305, 314. 1 Sid. 127. Co. Lit. 125. a. 155 b. 226. a. 1 Roll. Rep. 132.

(b) Br. Noſme 63. 5 Co. 68. a. b. Br. Fine 28. Fitz. Feoffment 56.

(c) Moor 105. Hob. 32. Styles 293.

(d) Br. Done 38

(e) Kelw. 49 :

(f) 1 Co. 85. a. Hob. 174. Co. Lit. 8. b. Br. N. C. 156. Br. Eſtate 4, 18, 73. Fitz. Feoffments & Faits 8. Plowd. 28. b. Bridgm. 134, 135. 1 Roll. 133. Perk. Sect. 181. Kelw. 178. pl. 26. 1 And. 225. 2 And. 141, 142. 3 Bulſt. 126. 4 Leon. 246. Godb. 121, 229.

for such Averment would be against the Judgment of the Law, which appears to the Judges upon the view of the Deed; so in the Case at Bar, if the general Word (*demanda*) had in Law, by the Judgment of the Judges, upon the Consideration of the whole Deed of Release barred her of her Dower, no foreign or collateral Averment *debors* could qualify or abridge the Force and Operation of the said Word, but it ought to be qualified by apt Words contained in the Deed itself, as in this Case it was. And afterwards Judgment was given for the Demandant.

Mich.

Mich. 8 Jacobi Regis.

ARTHUR BLACKAMORE's *Case.*

AN Original Writ was brought in *London*: *Jacobus Dei gratia Angliæ*, &c. *Præcipe* Leventhorp Franke *nuper de* Hatfield Brodock *in Comitatu* Eſſex *generoſo*, *alias dicto* Leventhorp Franke *de* Hatfield Brodock *in Comitatu* Eſſex *generoſo*, *quod reddat* Arthuro Blackamore, & Johanni Whittingham, 100 *li. quas eis debet & injuſte detinet*, returnable *menſe Michaelis*; the Entry of the *Capias*, *Alias*, & *Pluries*, was according to the ſaid Original; but in the Exigent and Proclamation, and the Entry thereof, the Defendant (as the Truth was) was named *Knight*, and in Eaſter Term, *Anno* 8 *Jac.* he put in a *Superſedeas* by the Name of *Knight*, and ſo the Plaintiff declared againſt him: And the Defendant imparl'd till *Trinity* Term following, in which Term Judgment was given againſt him by Default, by the Name of *Knight*. And this *Mich. Term*, *Anno* 8 *Jacobi Regis* a Writ of Error was brought, and it was moved by *Houghton* Serjeant, that the ſaid Original might be amended, becauſe *John Bunbery*, the Plaintiff's Attorney, drew a Note or Title of the Writ in this Form; London: Leventhorp Franke *nuper de* Hatfield *in Comitatu* Eſſex *militi*, *alias dict'* Leventhorp Franke *de* Hatfield Brodock *in Comitatu* Eſſex *generoſo*, &c. *ut ſupra*, and delivered this Note or Title to the Curſitor of *London*, and he miſtook it *in hoc*, that where *in primo nomine* he ought to be named *Militi*, *in primo nomine* the Curſitor named him *Generoſo*, as he was named in the Obligation, and this was the true Caſe, as appears on the Examination of the Curſitor, and of the ſaid Attorney, upon their Oaths, and

1 Roll. 198.

1 Roll. 198.

upon View of the Note or Title in full Court. And whether this was amendable or not by this Court, the Original being purchaſed out of another Court, *ſcil.* the Chancery, was the Queſtion. And the Caſe was well argued at the Bar by Counſel on both Sides; and at laſt it was reſolved, *per totam Curiam*, That the Record ſhould be (*a*) amended by the ſaid Curſitor, and made according to the Note or Title delivered him by the Attorney. And for the better underſtanding of the Law, and of the true Reaſon of the Rule of our Books in this and other Caſes of Amendments, 1. We muſt conſider, if in this Caſe the ſaid Original Writ was amendable by the Common Law, or by any Statute, and by what Statute? And it was reſolved, That an Original Writ was not amendable by the Common Law in the Caſe of a Common Perſon: *Vide* 13 *E.* 3. *Amendment* 63. which was before any Statute made concerning Amendments, *&c.* and 16 *E.* 3. *Variance* 59. 29 *E.* 3. *Amendment* 68. But in the King's Caſe, in a *Quare Impedit*, where the Writ of *Quare Impedit* was (*b*) *præſentere* for *præſentare*, after Exception taken to it, and before Anſwer, by the Advice of the Chancellor (out of which Court this Writ iſſued) and of the Judges of the King's Bench, the Writ was amended in the Chancery, and the Defendant was put to anſwer it by Award. *Vide* (*c*) 4 *H.* 6. 16. *b.* & (*d*) 40 *Aſſ. p.* 26. And where there appears in (*e*) 20 *E.* 4. 7. 10 *H.* 7. 25. *a. b.* a diverſity of Opinions, Whether there were any Amendment at the Common Law, or not? It is without Queſtion, That at the Common Law, a Fault of Entry of a Continuance, or of an Eſſoign, which was the Miſpriſion of the Court itſelf, in the Form of Entry was amendable by the Court; as appears by 5 *Ed.* 3. 25. (*f*) where *W.* brought a *Præcipe* againſt *B.* who vouched to warranty *C.* who entred into the Warranty and pleaded to iſſue, a *Venire fac'* iſſued, *&c.* and the Jury was reſpited, and in the Roll it was entred, *Jur' inter B. & C.* (which was between the Tenant and the Vouchee) in ſuch a Plea, *ponitur in reſpect'* where the Entry ought to be, *Jur' inter W. & C. quem B. vocavit ad warrant' & qui ei warr'*, and becauſe this Miſpriſion of the Entry in the Roll was taken to be the Default of the Court, it was (as in the Caſe of an Eſſoign) amended by the Court. So in 10 *E.* 3. 20. *a.* The Miſpriſion of the Court, in the Entry of an Eſſoign, was amended by the Court. And 12 *E.* 3. *Amendment* 62. *acc.* which Books were before any Statute of Amendment. *Vide* (*g*) 2 *H.* 4. 4. *a.* 18 *E.* 3. *Amendment* 56. 19 *E.* 3. *tit. Amendment* 65. And at the Common Law, Variance in any Part of the Record of the Original was amendable by the Common Law, as it is ſaid in (*b*) 7 *H.* 6. 45. *a.* So at the Common Law, the Judges might amend as well their Judgment, as any other Part of the Record, *&c.* in the ſame (*i*) Term, for

(*a*) 1 Roll. 198. Popham 203.

(*b*) Fitz. Amendment 19. 45 E. 3. 6. b. 8 Co. 26. b.

(*c*) 8 Co. 26. b. 9 Co. 48. a. Fitz. Amendment 22. Br. Eſſoign 67. Br. Brief 212. Br. Office del Court 6. Br. Faux Latin 96.

(*d*) Antea 26. b. Br. Amendm. 59. Br. Faux Latin 74. Poſtea 162. b.

(*e*) Br. Amend. 74.

(*f*) 6 E. 3. 25. a. Fitz. Amendm. 73.

(*g*) Br. Amendment 26. Fitz. Amendm. 7.

(*b*) Br. Amendm. 34. Poſtea 158. a.

(*i*) Co. Lit. 260. a 5 Co. 74. b.

for during the Term the Record is in the Breaſt of the Judges, and not in the Roll, *Vide* 7 *H.* 6. 29. *a. b.* (*a*) 9 *E.* 4. 3. *b.* 2 *R.* (*b*) 3. 11. *a. b.* But at the Common Law, the Miſpriſion of Clerks in another Term in the Proceſs was not amendable by the Court, for in another Term the Roll is the Record, and therefore by the Statute of (*c*) 14 *E.* 3. *cap.* 6. (which was the firſt Act of Amentment) it is enacted, by the Miſpriſion of Clerks in every Place whereſoever it be, no Proceſs ſhall be annulled or diſcontinued by miſtaking in writing one Letter, or one Syllable too much, or too little, *&c.* but ſhall be haſtily amended in due Form, but this Statute extends only to the Amendment of the Miſtake of the Clerk in Proceſs to be amended in due Form, for *Anno* 15 *E.* 3. *Amendment* 58. which was the next Year after the Statute made, in *Detinue* of three Writings, by Omiſſion of one Writing in the Continuance, all the Proceeding was diſcontinued, notwithſtanding the new Statute, (*ſc.* 14 *E.* 3.) which gave that the Proceſs ſhould be amended, *Vide* (*d*) 45 *E.* 3. 19. *b.* And this Statute extends to a Writ Judicial, or Proceſs, as in Treſpaſs the *Niſi prius* was *ad damnum* 100 *s.* where the Record was 100 *l.* and the Jury at the *Niſi prius* found 20 *l.* and the Writ of (*e*) *Niſi prius* was amended by Force of this Statute, and made 100 *l.* according to the Record 2 *H.* 4. 6. *a. vide* 45 *E.* 3. 19. And in 44 *E.* 3. 18. it is obſerved, That a Man has often ſeen the judicial Writs amended by the Roll, but the Roll never (before the ſame Caſe, as it is there ſaid) was amended, *vide* 40 *E.* 3. 15, 36. 19 *H.* 6. 15. 3 *H.* 4. 8. *&* 11. 47 *E.* 3. 14. * 7 *E.* 4. 15. *b.* 9 *H.* 7. 8. 4 *H.* 6. 6. But this Statute doth not extend to an Original Writ, nor to a Writ which is in the Nature of an Original, for that is not included within this Word *Proceſs*. And therefore (*g*) *Finchden* ſaith, in 41 *E.* 3. 14. *a.* if an Original Writ wants Form it is abateable, becauſe an Original is made in one Place, and pleadable in another, and by Conſequence can't be amended; otherwiſe it is of a Writ Judicial, *Vide* 11 *H.* 4. 70. *a.* (*h*) A Protection ſhall not be amended in the Common Pleas, becauſe made in another Court. So it is held in 4 *H.* 6. 4. *a.* Every Original Writ ſhall abate for want of Form (as if the Wife be named before (*i*) the Huſband) as well as if it wants Matter, without any Amendment: But a Judicial Writ ſhall not abate for want of Form, if it has ſufficient Matter, (*k*) 3 *H.* 4. 4. *a.* An Original, or that which is in the Nature of an Original, ſhall not be amended, and therewith agree 29 *E.* 3. *Amendment* 68. in *Wagam*'s Caſe, 22 *E.* 4. 47. *vide* 8 *H.* 6. 37. *a.* So in (*l*) 46 *E.* 3. *Amendment* 53. in a Writ of Entry *ſine aſſenſu Capituli* brought by an Abbot againſt *R.* who pleads *Non dimiſit, &c. & de hoc ponit ſe ſuper patriam, & prædict' R. ſimiliter*; where it ſhould be, *& præd' Abbas ſimiliter*, and the Jury was diſcharged, and it was not amended, for it was

(*a*) Fitz. Amendm. 2.
(*b*) Br. Amendm. 87.
(*c*) 5 Co. 45. 2.
(*d*) Fitz. Amend. 52. Br. Amendm. 24.
(*e*) Br. Amend. 27. 1 Roll. 202. Fitz. Amend. 8. Poſtea 162. a. Dyer 261. pl. 25. Moor 681.
(*f*) 2 Vent. 171.
* Poſtea 162. Fitz. Amend. 51. Br. Amend. 71.
(*g*) Br. Amend. 20. Br. Faux Latine 9.
(*h*) Br. Amend. 101. Poſtea 158. a. 2 Roll. 329. Br. Protection 35. Br. Miſnomer 22. Br. Variance 33. Fitz. Variance 45.
(*i*) 4 H. 6. 3. b. 4. a. Palm. 33. 2 Leon. 59. Br. Brief 208. Br. Faux Latin 3, 49. Br. Scire facias 129. Fitz. Brief. 24.
(*k*) Br. Miſnoſm. 18. Br. Variance 26. Fitz. Variance 29.
(*l*) Poſtea 157.

not within the Statute which gave, that Proceſs ſhould be amended in due Form, and therefore the Parties repleaded. And it is to be known, That this Word (*Proceſs*) which is the only Word in this Statute which is to be amended, is taken in Law in two Significations, in one largely, and in the other ſtrictly; and in the large Senſe it is taken for all the Proceedings in all Real and Perſonal Actions, and in all Criminal and Common Pleas: *& proceſſus derivatur a procedendo ab originali uſque ad finem. Vide Britton* 138. And in this Senſe it is taken in the *Regiſter Original* 128. *a.* in the Writ *De continuando proceſſum poſt mortem Capitalis Juſtic'* in a Writ of *Oyer* and *Terminer*, within which Words (*Proceſſus*) as it there appears, is included not only the Judicial Proceſs, but alſo the Commiſſions, Indictments, Rolls, *& alia memoranda:* And *in alio ſenſu*, this Word (*Proceſſus*) is taken more ſtrictly, *ſc.* for the Proceeding after the Original out of the Plea-Roll before Judgment, and that appears in the Writ of Error in the *Regiſter* 216. and (*a*) *F. N. B.* the Words of which are, *Quia in recordo & proceſſu, ac etiam in redditione Judicii*, &c. where *recordum* contains the Plea-Roll, *Proceſſus* all the Proceeding out of it 'till the Judgment. See the Writ of *Certiorari* in the *Regiſter* 167. *a.* And in this Senſe, in all Actions real, perſonal, and mixt, and not in Pleas of the Crown, is the ſaid Act of 14 *E.* 3. to be intended. And this appears by the ſaid Book in (*b*) 46 *E.* 3. *Amendment* 53. for the Miſpriſion was in the Plea-Roll, and theref. it was not amended, and 46 *E.* 3. 19. *a. b.* in *Treſpas*, Diſtreſs iſſued (*c*) *Quindena Trin'* retornable *Quind' Mich'* and the Roll was, *de quinden' Trin' ad Quinden' Hillar'* and at *Quindena Mich'* it was pleaded to Iſſue, and found for the Pl. and the Def. ſhewed this Matter in arreſt of Judgm. and the Juſtices would not amend the Roll (which there is called the Original) but awarded the Parties to replead. But in 18 *E.* 3. *Amendment* 56. the Miſtake was in the Entry of the Eſſoign, which was out of the Record or Plea-Roll, and that was Part of the Proceſs, *i.* proceeding amendable by the ſaid Act; and that appears more fully after. But upon this Stat. there was a diverſity of Opinions in divers Points, *ſc.* If the Juſtices before whom the Plea ſhould be depending by Adjournment, Error, or otherwiſe (*Vide* 17 *Aſſ. p.* 2.) ſhould have Power to amend the Miſtake of the Clerk in Proceſs in Writing a Letter or Syllable, *&c.* alſo, if they might amend it as well after Judgment as before; and theſe Doubts were explained and declared by the Stat. of 9 *H.* 5. *c.* 4. *&* 4 *H.* 6. *c.* 3. to extend to all the Juſtices, and as well after as before Judgm. And alſo a great Doubt was conceiv'd on theſe Words, *Writing a Letter or Syllable too much or too little*, if a Word might be amended; and (*d*) 40 *E.* 3. 34. *b. Belknap* ſaith, That the Stat.

(*a*) F. N. B. 22. i. 24. d.

(*b*) Antea 157. a.

(*c*) Br. Amendment 110.

(*d*) Fitz. Amendment 15. Br. Amendm. 18.

of

of 14 *E.* 3. *cap.* 6. that a (*a*) Letter or Syllable too much or too little in a Word may be amended, but where there wants a Word, of that the Statute ſpeaks nothing. *Thorp*, It was heretofore debated here before us, If a Word fail in the Record, if it might be amended, as if it had failed but in a Syllable or Letter; and Sir *Hugh Green* and I went together to the Counſel, and they were 24 of the Biſhops and Earls, and we (*b*) demanded of them who made the Statute, if the Record might be amended; and the Archbiſhop, or Metropolitan ſaid, That it was a nice Demand, and a vain Queſtion of them, if it might be amended or not; for he ſaid, that it might be as well amended in this Caſe, as if it were but one Letter, for if a Letter or Syllable fail in a Word, it is no Word, wherefore if all the Word fail it may be amended as well as if it failed but of a Letter, or of a Syllable, for there is no more Difference in the one Caſe than in the other. And 39 *E.* 3. 21. *a.* the Queſtion alſo was, if a Word might be amended by the Statute of 14 *E.* 3. and there *Thorp* ſaid, That it ſhall be amended by the Statute, for heretofore we were in doubt of it; and becauſe there was diverſity of the Sirname in a Writ, it was brought for the ſame Cauſe into a Parliament; and the Lords who made the Statute ſaid, Their Meaning was, that in all theſe Caſes the Proceſs ſhould be amended. *Note*, where it is ſaid in 40 *E.* 3. 34. *b.* That the Juſtices went to Counſel; it appears by 39 *E.* 3. 21. *a.* that they went to the Parliament to know the Opinion of thoſe who made the Law, 11 *H.* 4. 70. *a.* In a *Precipe* the Original was, *Mich. de T.* and the mean Proceſs was, *Mich. T.* and (*c*) (*de*) omitted, and a Protection was caſt by the Name of *T.* and the Meſne Proceſs was amended by the Statute of 14 *E.* 3. and that a Word ſhall be amended, within theſe Words Letter or Syllable, and *eo potius*, becauſe (*de*) is a Word and Syllable alſo; but the Protection was not amended, becauſe it was made in another Court. 7 *H.* 6. 45. it ſeems that a (*d*) Title ſhall be amended within theſe Words, Letter or Syllable. To take away all which Doubts, and to enlarge the Power of the Juſtices in Amendments, the Statute of 8 *H.* 6. *cap.* 12. was made, and that ſtands upon two general Parts, *ſc.* 1. Againſt corrupting and falſifying of Records, by raſing, interlining, *&c.* which Clauſe doth not concern the Caſe in Queſtion. 2. Againſt the Miſtake of Clerks (by Force of which the Amendment was in the Caſe at Barr) the Words of which Branch are, *And that the King's Judges of the Courts, and Places in which any Record, Proceſs, Word, Plea, Warrant of Attorney, Writ*, (Original, *or* Judicial, for ſo the Statute ſpeaks in the firſt Clauſe) *Pannel, or Return, which for the*

(*a*) Br. Amendment 18. Fitz. Amendm. 15.

(*b*) 1 Mod. Rep. 153.

(*c*) 2 Roll. 329. Antea 157. *a.* Br. Protection 35. Br. Miſnomer 22. Br. Variance 33. Fitz. Variance 45. Br. Amendm. 101.

(*d*) Antea 156. *b.* Br. Amendm. 34.

the Time ſhall be, ſhall have Power to examine ſuch Record, Proceſs, Word, Plea, Warrant of Attorney, Writ, Pannel and Return by them, or by their Clerks, and to reform and amend in Affirmance of the Judgment of ſuch Records and Proceſſes, all that to them, in their Diſcretion, ſeemeth to be the Miſpriſion of the Clerk in ſuch Records, Proceſs, Word, Plea, Warrant of Attorney, Writ, Pannel, and Return, &c. So that by ſuch Miſpriſion of the Clerk, no Judgment ſhall be reverſed, or annulled.

(a) 14 E. 3. cap. 6. (b) 8 H. 6. cap. 12.

Note Reader, Where the Act of (*a*) 14 *E.* 3. ſpeaks only of Proceſs, this Act of (*b*) 8 *H.* 6. is of far greater Extent, for it extends to Proceſs, and to ſeven other Things, *ſcilicet*, 1. To any Record. 2. Word. 3. Plea. 4. Warrant of Attorney. 5. To a Writ Original and Judicial, as appears by the firſt Branch of the Act. 6. Pannel. 7. Return. So that the Power of the Juſtices, as to Amendment, is by this Statute greatly enlarged. Alſo, 1. This Statute gives them Power of Examination. 2. Of Reformation and Amendment. 3. The Statute expreſſes the Matter which they ſhall reform and amend; *ſc.* all that which to them, in their Diſcretion, ſeems to be the Miſpriſion of the Clerk in ſuch Records, Proceſs, Word, Plea, Warrant of Attorney, Writ, Pannel and Return: As to the firſt, they have Power to examine ſuch Records, Proceſs, *&c.* in two Manners: 1. By themſelves. 2. By their Clerks. As to the Power of Reformation and Amendment, they have Power only to do it in Affirmance of the Judgments of ſuch Records, and Proceſſes; but although their Power be thus enlarged, yet the Miſpriſion of the Clerk (as it was in the Act of 14 *E.* 3.) is only to be amended. And becauſe there appears *prima facie*, great incertainty in our Books concerning Amendments (whereas in Truth there are not any more certain Rules in the Law, if they are well obſerved and underſtood, than in Caſe of Amendment) it will be neceſſary briefly to collect them out of the Books at large, touching the Conſtruction of this Statute. And becauſe this principal Caſe was of the Amendment of an Original; 1. It ſhall be ſhewed in what Caſes the Miſpriſion of the Clerk in Original Writs, ſhall be amended within this Statute, and in what not. Every Original Writ ſtands upon two Parts, one upon an Artificial Form, according to the *Regiſter*, and that the (*c*) Clerk ought *ex Officio* to do by his Knowledge and Skill, without any Inſtruction of the Party: The other upon the true Inſtruction by the Party, of the Truth and Particularity of his Caſe, requiſit to the Compoſing of the Writ, and that the Clerk cannot do

(c) 2 Roll. Rep. 285.

do without the Party: So that an Original Writ may be vitious, by Miſpriſion either of the Clerk, or of the Party: By Miſpriſion of the Clerk in 5 Manners: 1. By miſtaking the legal Form; 2. By miſtaking of one Word which is not any Latin for another; 3. By Omiſſion or Addition of Words; 4. By miſtaking the Record, Speciality, Writing, Copy, Inſtruction, Note or Titling of the Writ delivered to the (a) Clerk, or taken by the Clerk for framing the Writ; 5. By Miſpriſion of the Clerk, or Officer, in negligent keeping, or voluntary defacing, &c. of a Record, &c. And becauſe the Caſe of Amendment in the Caſe at Barr was not for any Miſpriſion of the Bond on which the Writ was grounded (for he has purſued it in all) in which Bond the Defendant was named *Generoſus*, as he was in the Writ, But the Miſpriſion of the Clerk of the Chancery was in this, that he did not purſue the Note or Inſtruction in Writing delivered him, *ſc.* to name the Defendant Knight *in primo nomine* becauſe after the making of the Bond, he was made Knight: This Differ. is firſt to be obſerved, That if the original Writ wants legal Form, it is ſuch a (b) Miſpriſion which is not amendable by this Act, for the Officers and Clerks of the Chancery are bound by the Duty of their Offices to have Skill and Knowledge in the true Form of Original Writs (which are the (c) Foundations upon which the whole Law depends) and therefore if Want of Form of Original Writs ſhall be neglected, Ignorance, the Mother of Error and Barbarouſneſs, will follow, and in the End all will be involved in Confuſion, in Subverſion of the antient Law of the Land, for in this Caſe it is true that *forma dat eſſe*, and therefore it was never the Meaning of the Makers of the Act within theſe general Words, (Miſpriſion of the Clerk in Original Writ) to (d) extend it to Miſpriſion of the Form of the Original Writ, which would introduce ſo great Inconvenience; and therewith agrees a Notable Judgment, in 22 *E.* 4. 21. *b.* & 22. *a.* in *Eliz. Hatley*'s Caſe, where a Writ of Debt was brought againſt Executors for a Debt due by the Teſtator in the (e) *Debet & Detinet*, where by the Form of the Regiſter it ought to be in the *Detinet* only, and there it is reſolved by the whole Court, that it ſhall not be amended, for there a Difference is taken and reſolved, between (f) Negligence, and Ignorance of the Clerk; for Negligence, that is, the Overſight of the Clerk in miſtaking, as if he has the Bond or a Copy of the Bond, and doth not follow it, (g) the miſtaking, that is Overſight and Negligence in this Caſe, and in all like Caſes, ſhall be amended by the Statute of 8 *H.* 6. But (h) Ignorance, or not knowing, (for *ſcientia Sciolorum eſt mixta ignorantia*) of the Clerk in the

(a) Cro. El. 79.

(b) Cr. El. 170. 5 Co. 45. a. b.

(c) 3 Co. 38. a. Co. Lit. 73. b. Præf. F. N. B.

(d) Cr. El. 119. 462.

(e) Br. Amendm. 78. Fitz. Amend. 4. 5 Co. 35. b.

(f) Cr. El. 170.

(g) Cro. El. 79. 258. 435.

(h) Cr. El. 119.

the legal Form, and Courſe of the Original, is not a Miſpriſion amendable by the ſaid Statute. So if the Writ be *Præcipe quod ſolvat*, for (a) *Præcipe quod reddat*, or *Warr' Chartæ unde pactum habet*, for *unde Chartam habet*, theſe are Faults of Form, and therefore are not amendable by this Act. And for the firſt Part of this Difference, as to the Copy of the Bond, it is held, in 38 *H.* 6. 4. *a.* That where the Clerks of the Chancery uſe to take Titling of the Matter which the Party ſhews them, If the Party to have a *Formedon in Deſcender* ſhew the Clerk that the Land deſcended to one as Son and Heir of the Donees, *&c.* and the Clerk draws the Writ, that the Land deſcended to him as Son, (and omits (b) Heir) if the Clerk ſhews his Titling and will teſtify it, it ſhall be amended in the Common Pleas, and that is, by the ſaid Statute of (c) 8 *H.* 6. *Vide* 22 *E.* 4. 48. *b.* 38 *H.* 6. 39. *a. b. &* 11 *H.* 7. 41. *b.* agree to the Caſe of a Copy. But if the Writ wants legal Form, it is not amendable, *Vide* 14 *H.* 4. 10, 11. (d) 27 *H.* 6. 6. *b.* 11 *H.* 6. 14. 34 *H.* 6. 26. 28 *H.* 6. 11. and upon this Reaſon it has been often adjudged ſince this Stat. of (e) 8 *H.* 6. that falſe Latin in an original Writ ſhall not be amended, becauſe it wants legal Form, and is to be imputed to the Ignorance of the Clerk, 9 *H.* 7. 16. *b.* as (f) *hos breve*, for *hoc breve*: And the Common Law is curious in obſerving the Form of the *Regiſter*, and therefore it is adjudged in 6 *E.* 3. 36. *b.* 37. *a.* That where a Treſpaſs done by divers is joint or ſeveral, at the Will of the Pl. yet in an Action againſt *John* Guardian of the Hoſpital of *B.* and Brother *Rob. L.* and Brother *Ricb. F.* inas much as this Default of the Clerk for Want of Form, that theſe Brethren are not named Confrerers, as it ought to be by the Form of the *Regiſter*, the Writ ſhall abate againſt all, altho' the Guardian be well named. But in Treſpaſs againſt two, Miſnoſmer of one of the Def. ſhall not abate the whole Writ, but it ſhall ſtand againſt the other who is well named; for there *Herle* took the Difference, when the Writ abates by the Plea of the one for Want of Form, altho' the others have pleaded to Iſſue, the Writ ſhall abate againſt all; but altho' one may abate the Writ for Matter in Fact, as by Reaſon of the Miſpriſion of his Name, nevertheleſs the Writ ſhall ſtand againſt the others. *Vide* 2 *H.* 7. 16. 11 *H.* 7. 5, 6. 21 *H.* 7. 31. 7 *E.* 4. 10. 5 *E.* 4. 2. 11 *Aſſ.* 15. 12 *Aſſ. p.* 14. 27 *Aſſ. p.* 45. 9 *H.* 6. 36. 12 *E.* 3. Brief 670. 12 *E.* 3. Brief 481. 27 *H.* 8. 26. *b. Plow. Com. in Aſſiſe of Freſh Force.*

But as to the 2d Manner of Miſpriſion in negligent writing of a Word which is not any Latin Word, that is amendable, as (g) *imaginavit*, for *imaginatus eſt*, it ſhall be amended, as it is adjudged in 11 *H.* 6. 3. 17. So was it adjuged in 3 *E.* 6. as *Bendloes* Serjeant reports, That where in a Writ of *Aiel* the Writ was *ava*, (h) for *aviæ*, it was amended.

As

(a) 22 E. 4. 21. b. Br. Amendm. 78.

(b) Fitz. Amendm. 44. Br. Amendm. 56.

(c) 8 H. 6. cap. 12.

(d) Fitz. Amend. 35. Br. Amendm. 6. Br. Brief. 519. Poſtea 161. b.

(e) 8 H. 6. cap. 12.

(f) Br. Faux Latin. 78. 2 Vent. 173. 2 Sand. 39.

(g) 2 Vent. 173. Fitz. Amendm. 24. Br. Amendment 81.

(h) 5 Co. 45. b. Moor 5. 1 And. 24. N. Bend. 33. pl. 53.

As to the third Manner of Miſpriſion in negligent Omiſſion or Addition of a Thing which it appears he himſelf ought to have added, or omitted of Courſe; as by the Omiſ. of *Dei gratia* in the King's Stile, it ſhall be amended. 22 *H.* 6. 8. So 3 *E.* 6. as *Bendloes* Serj. reports, theſe Words in a *Partitione faciend.* (*a*) (*oſtenſur' quare non fecerit*) were left out, and it was amended. *Vide* 35 *H.* 6. 6. 10. *a.* 2 *H.* 7. 11. *b.* 9 *H.* 7. 19. for Addition of that which is apparent ought to be omitted. But the (*b*) Omiſſion, or Addition of any Thing which alters the Form of the Writ, is not amendable, as the Addition, or Omiſſion of (*c*) *Detinet*, as appears in 11 *H.* 6. 14. *a. b.* or the Addition of *debet*, as appears in 22 *E.* 4. 21. *b.* 22. *a.*

(*a*) 5 Co. 45. b. Moor 5. 1 And. 24. Daliſ. 5. pl. 9. N. Ben. 33. pl. 53.

(*b*) Cr. El. 119.

(*c*) 5 Co. 35. b.

As to the fourth Manner of Miſpriſion, *ſc.* of the Record or Speciality, *&c. Vide* 21 *H.* 6. 8. 22 *H.* 6. 43. 37 *H.* 6. 34. 19 *H.* 6. *Amendment* 47. 8 *E.* 4. 4.

As to the fifth Manner of Miſpriſion, in Negligence of a Clerk or Officer, not in Writing, *&c.* but in negligent keeping of the Records, or in voluntary defacing of them, whereby the Record becomes imperfect, or erroneous, in *Trinit.* 24 *Eliz.* the Caſe was, that *Henry Fitz-allein* late Earl of (*d*) *Arundel*, in the Reign of Queen *Mary* ſuffered a common Recovery of divers Manors, and of Lands and Tenements in the County of *Suſſex*, and the original Writ upon which the Recovery was had, being greater and broader than the other Writs of the ſame File, by the Negligence of the Officer by continual handling of it, a great Part of this Writ, which was more ſpacious than the reſt was obliterate, and worn out, ſo that but one Letter of many of the Names of divers of the ſaid Manors could be perceived, but the Names of the Manors were truly recited as well in the Count (which always briefly recites the Writ) as in the *Habere facias ſeiſinam:* and whether this Original was amendable, or not, was a great Queſtion between *P. Howard* Earl of *Arundel*, Couſin and Heir of the ſaid *Henry* Earl of *Arundel*, and the Lord *Lumley*, to whom the ſaid *Henry* Earl of *Arundel* had conveyed divers of the ſaid Manors, *&c.* And to reſolve this Queſtion, Sir *Chriſtopher Wray* Chief Juſtice of *England*, Sir *Ed. Anderſon*, Ch. Juſtice of the Com. Pleas, Sir *Roger Manwood*, Chief Baron of the Exchequer, and all the Juſtices of *England*, aſſembled themſelves together. And it was reſolved by them all *una voce*, That the Original Writ ſhould be amended according to the other Parts of the Record, *ſcil.* the Count, and the *Habere facias ſeiſinam*; and that this Miſpriſion and Negligence of the Clerk in keeping of the original Writ ſhould be amended by this Statute of 8 *H.* 6. for here doth not appear any Want of Knowledge in the Clerk, but Miſpriſion and Negligence in keeping of the Writ, which is a Miſpriſion within the Letter

(*d*) 1 And. 79. 80.

and

and Meaning of the Act; and *eo potius* in this Case, because it was in a common Recovery suffered by Assent of the Parties for Assurance of Lands. And although it is enacted, That if any Record, or Parcel thereof, Writ, Return, Pannel, Process, or Warrant of Attorney in the King's Courts, *&c.* are voluntarily (*a*) stoln, carried away, withdrawn, or avoided by any Clerk, that it shall be Felony, that doth not prove, That if the original Writ, or other Part of the Record be voluntarily stolen, *&c.* that it can't be supplied and amended by the other Parts of the Record: For it was resolved that in both Cases, as well where the Record becomes imperfect and erroneous by voluntary Offence of the Clerk, as by his careless Negligence that it should be amended, for all is within this general Word, Misprision of the Clerk, But if such Part of the Record which is so stolen, *&c.* or which appears not, can't be supplied by the other Parts of the Record, nor by any Exemplification made of the Record, then it can't be amended; and *vide* the first Clause of this Act of 8 *H.* 6. gives Remedy amongst others, where any Substraction or Diminution is of any Record, Process, Warrant of Attorney, Original Writ, *&c.* And according to this Resolution a Fine was amended of *Mich.* 8. *Jac.* as appears by the Order and Rule of the Court following.

(*a*) Palm. 199. 11 Co. 34. b. 3 Inst. 70, 71, 72, 73. Stand. Pl. Cor. 36. b. Dalt. Just. 386.

Crompton. *Mich.* 8 Jacobi *Regis.*

Lincoln' ss. *In fine levat' in Cur' hic in Octab' Sancti* Hilarii, *Anno Regni Dom'* Eliz' *nuper Reginæ Angliæ* 16. *inter* Robertum Tyrwhite *Militem & al' Quer' &* Edmund Dighton, *Armiger' & al' deforc' de Maneriis de Magna* Sturton, *Parva* Sturton, *& al' in Com' præd'; Quia constat Cur' super visu pedis ejusdem Finis, quod per humiditatem aeris, & pluviam super illam descenden' idem pes Finis adeo obliteratus est, & multæ lineæ ejusdem totalit' deletæ, ita ut legi non possunt; tamen per Breve de Coventione, & Dedimus potestatem de cognitione inde capiend' ac per concordiam & notam ejusdem Finis satis liquet & apparet quæ fuerunt verba in eodem pede prius script'. Ideo ordinat' est, quod præd' pes Finis cum Proclam' superinde indorsat' per Chirographar' de novo rescribatur, ita quod concord' cum præd' Brevi de Convent', Dedimus potestatem, Concordia, & nota ejusd' Finis, & cum aliis Proclam' indorsat' super pedes Finium ejusd' Term' Et quod præd' pes Finis sic obliterat' a filac' inde abstrahatur, Et præd' pes Finis sic de novo rescript' in loco ejusdem affiletur.*

And this briefly shall suffice for Amend. of the Misp. of the Clerk in an Original Writ. And as to the Case at Bar, the Rule

Rule of the Court was in these Words: *Crompton. Ordinatum est per Cur' hic super auditu Concilii utriusque partis & examinatione Clerici Curs'star' London & attornat' Quer' super Sacramenta sua in Cur' hic, quod hæc additio (Generoso) nomini Defend' in priori parte Brevis original' de debito 100 li. inde return' & affilat' in Banco hic mense Michaelis anno Regni Regis nunc septimo, & omnes miss'siones in Recordo & proces'' ejusd' placiti proinde subsequen' emendentur, & fiant (Militi) secundum instructiones in script' prius deliberat' præf' Curs'star' viz. prad' Breve Originale per præfat' Curs'star' & Recordum, & proces'' præd' per Philizar' hujus Curiæ.*

The next Word in the Act of (*a*) 8 *H.* 6. is (Record) and the first Part of the Record is the Count; and briefly a Count which wants Substance shall not be amended in another Term, as appears (*b*) 7 *H.* 6. 26. *a.* (*c*) 35 *H.* 6. 37. *b.* (*d*) 38 *H.* 6. 1. *a.* (*e*) 7 *Ed.* 4. 26. *b.* 9 *Ed.* 4. 5. (*f*) 33 *H.* 6. 2. *a. Vide* 38 *H.* 6. 33. and 30 *H.* 8. *Br. Amendment* 80. for the King's Case.

But it is enacted by the Statute of (*g*) 36 *E.* 3. *cap.* 15. That by the ancient Forms and Terms of Pleaders no Man be prejudiced, so that the Matter of the Action be fully shewed in the Declaration and in the Writ. *Vide Eveleigh's* Case, 13 *Eliz. Dyer* 299. by the Stat. of 36 *E.* 3. *c.* 15. the Declaration having Substance shall (*h*) not abate for Form. *Vide* 28 *H.* 6. 8. *a.* In a Writ brought by *John Gargrave* against *Tho. Beamond* on a Bond, and the Bond was, *Noverint*, &c. *me* Tho. Beamond, *teneri*, &c. *Jo. Gargrave* (without Addition) and the Writ was, *Præcipe*, &c. *quod reddat* Joh. Gargrave (*i*) *Armig.* with Addition and it was moved, that it might be amended by the Stat. for it is the Misprision of the Clerk: But it was adjudged, That the Writ should abate for this Variance and shou'd not be amended, as it shou'd if it was on the Def. Part; For where the Surplusage is on the Pl's Part, as well in the Writ as in the Count, a Man cannot amend his own Count. And this Judgm. was after the said Stat. of (*k*) 8 *H.* 6. which proves that the said first Clause of this very Act, which speaks of Addition or Diminution, &c. extends only to Corruption, and Misdemeanor in Addition or Diminution and in viciating of a Record, and not where it is done in *rei veritate*, altho' it be by Misprision. *Vide* 4 *E.* 4. 14. *b.* (*l*) A Space in the Declaration for the Place where the Obligation was made, was not amendable in another Term. And this which has been said of the Count shall suffice. Other Parts of the Record are, Plea in Bar, Replication, &c. and regularly Matter of Substance in them, and especially Matters of Fact shall not be amended in another Term, as Omission of Averment, *Et hoc parat' est verificare*, &c. for in some Cases as in Avowry, &c. it is not of Necessity, but Colour which is of Course, and in which there is a Misprision of the Clerk, shall

(*a*) 8 H. 6. cap. 12.

(*b*) Fitz. Count 12. Br. Amendment 30.

(*c*) Br. Amendment 15. Br. Count 22. Br. faits 5. Fitz. forger de Faux. faits 14.

(*d*) Br. Count 504.

(*e*) Br. Count 92.

(*f*) Br. Amendment 8.

(*g*) 10 Co. 132. b. Cr. Eliz. 85. 2 Bulstr. 214. Dyer 299. pl. 32. Co. Lit. 304. b.

(*h*) Plowd. 83. b. 2 Bulstr. 214. Dyer 299. pl. 32.

(*i*) Fitz. amendment 37. Br. Amendment 93. Fitz. Brief 109. Br. Brief 28. Br. Nugation, &c. 23.

(*k*) 8 H. 6. cap. 12.

(*l*) Fitz. Amendment 49. Br. Amendment 68. Br. brief 478. Br. Count 64. 1 Rolls 208. 20 H. 6. 18. 2. Pr. Amend. 51. Fitz. Amendment 28.

be amended. And the Record in another Term may be amended by the (*a*) Paper Book of the Office, for it was the Miſpriſion of the Clerk in the entring of it, and no Fault in the Party or his Counſel (*b*) 27 *H.* 6. 6. *b.* (*c*) 10 *H.* 7. 23. *a. b.* 25 *a.* 11 *H.* 7. 2. *a. b.* (*d*) 20 *H.* 6. 18. *a.* (*e*) 27 *H.* 8. 1. *b.* the Miſpriſion of a Certificate of a Record on a Writ of Error ſhall be amended according to the Record, 22 *E.* 4. 46. & 21 *H.* 7. 41. but that is by the expreſs Proviſion of the ſaid Statute of 8 *H.* 6. for it was the Act of the Judge, which was not amendable by the ſaid Branch of the Act, as ſhall be ſaid after. A Thing apparent to be a Miſpriſion, which the (*f*) Clerk of Courſe ought to have added, without any Inſtruction of the Party, altho' it be in a material Point, ſhall be amended in another Term. As if in Debt brought, the Def. pleads *nil debet*, & *de hoc ponit ſe ſuper Patriam*, & *prad' Defendens ſimiliter*; where it (*g*) ought to be, & *prad' Querens ſimiliter*, it ſhall be amended by this Act of 8 *H.* 6. 11 *H.* 7. 2. *acc.* which Caſe was not amendable by the Act of 14 *E.* 3. as appears by the Book in 46 *E.* 3. before, for the firſt Act ſpeaks only of Proceſs, and this Act ſpeaks of the Record and Plea. So in an Action brought againſt Sir *Rog. Townſend*, he pleaded in Bar, and concluded, which Matter *prad' Johan'* is ready to averr, where it ſhould be *Rogerus*, and it was amended by the Advice of all the Juſtices; as it is reported in 11 *H.* 7. 25. *a.* And as to the Writ of *Niſi prius*, it is to be known, That the Miſpriſion of the Clerk of the Treaſury, who writes it, is alſo therein amendable by this Statute, and to be made according to the Record, but with this Caution, *ſcil.* That the Record of *Niſi prius* have ſufficient Matter in it either expreſſed or implied to give Authority to the Juſtices of *Niſi prius* to try the Iſſue; for they can't try any Iſſue by Force of the Stats. made thereof, without Authority given to them by Writ of *Niſi prius*, and ſo it is adjudg'd in 11 *H.* 6. 11. *a. b.* in Debt againſt *J. S.* Husbandman Iſſue was taken, if he was Husbandm. *die impetrati' Brevis*; and the Writ of *Niſi prius* was, whether he were Husbandm. (omitting theſe Words, *die* (*h*) *impetrationis Brevis*,) which was the material Point of the Iſſue; but the Roll was well, and the Jury paſſed for the Pl. and found that the Def. was Husbandman *die Impetrationis Brevis*, and the Writ of *Niſi prius* could not be amended by the Stat. of 8 *H.* 6. becauſe the Juſtices of *Niſi prius* have no Power to try the Iſſue contained in the Record, becauſe *die impetr' Brevis* was omitted in the *Niſi prius*; and if the Juſtices of *Niſi prius* had taken the Verdict according to the Iſſue in the Writ of *Niſi prius* that he was Husbandm. generally, without ſaying *die impetrat' Brevis*, it had been contrary to the Roll; wherefore it was awarded, That the Plaintiff ſhould ſue a *Venire facias de novo*. But 9 *Eliz. Dyer* 260, 261. *in partitione fac'* by *Wotton* againſt (*i*) *Anthony Cook* and *Temple*, who appeared, and *Temple*

(*a*) Cr. Eliz. 258. Salk 50, 51.

(*b*) Fitz. Amendment 35. Br. Amendm. 6. Br. brief 519. Antea 159. b.

(*c*) Br. Amendment 112.

(*d*) Br. Amendment 5. Fitz. Amend. 28.

(*e*) Br. Amend. 1.

(*f*) Cr. Car. 38. Cr. Jac. 64, 65.

(*g*) Cr. Jac. 587. 1 Rolls 200.

(*h*) Fitz. Amendment 25. Br. Amend. 82. Salk 48, 49.

(*i*) 1 Rolls 202. Dyer 260, 261. pl. 24, 25. Cr. Car. 54, 278.

2 Brownl. 47. 3 Bulſtr. 161. Yely. 109. Cr. Eliz. 776. Palm. 524. Moor 681.

confeſſed the Partition, and Judgm. given accordingly *ſed ceſſet executio*. *Cook* conveyed Title in ſeveralty, and traverſed the Suppoſal of the Writ and Count by *abſque hoc*, the Pl. maintained the Writ and Count, *& hoc petit quod inquiratur per Patriam, & præd'* Anthonius *ſimiliter, ideo* 12, &c. And in the Record of *Niſi prius* the Iſſue was well recited and no Part of it omitted; But where the Pl. concluded, *& hoc petit quod inquiratur per Patriam*, by the Negligence of the Clerk of the Treaſury, the Writ of *Niſi prius* was, *& præd' ſimiliter*, omitting this Word *Anthonius* in the Cloſe, and joyning of the Iſſue. And farther, the Jury entred in the Record of *Niſi prius* was, *Inter Wotton* Pl. and *Cook* and *Temple* Def. where *Temple* had made a Confeſſion of the Partition before, and ſo a Stranger to the Iſſue: But the Record which warranted it was well enough; And notwithſtanding theſe Faults and Miſpriſions, the Iſſue was tried at *Niſi prius*, and afterw. by the Rule of the Court of Com. Pleas, the Verdict was well taken, and the ſaid Miſpriſions were amended; for ſufficient Authority was given by the Writ of *Niſi prius* (which is but the Tranſcript of the Record) to try the Iſſue, and to take the Verdict. If a Man declare of Damages of 100 *li.* and the Record of *Niſi prius* is 100 *s.* and the Jury give Damages 20 *li.* the (*a*) *Niſi prius* ſhall be amended and made 100 *li.* according to the Roll; for it is the Miſpriſion of the Clerk, which doth not change the Iſſue. *Vide* 11 *Hen.* 7. 1. *b.* 10 *H.* 7. 25. *a. b.* and ſo was it adjudged in 2 *H.* 4. 6. *a. Vide* 39 *E.* 3. *Br.* 105. (*b*) 7 *E.* 4. 15. *vide* after, when Miſpriſion of the Clerk in the Entry of the Verdict or Judgment, which are other Parts of the Record, ſhall be amended. As to (Word) that has been explained before.

As to this Word (Plea) that has been explained before in the Word (Record) which includes it.

As to (*c*) (Warrant of Attorney) See * 23 *Hen.* 8. *Amendment* 85. 24 *Hen.* 8. *Amendment* 47. 2 *Ma. Dyer* (*d*) 105. 2 *Eliz. Dyer* (*e*) 180. 5 *Eliz. Dyer* (*f*) 225. 6 *Eliz. Dyer* (*g*) 231. But when no Warrant of Attorney is put in, it is not remedied by this Act. As to Pannel and Return, in what Caſes Miſpriſions of them ſhall be amended within this Statute. *Vide* (*h*) 2 *E.* 4. 7. *a. b.* 9 *E.* 4. 14. *a.* 33 *H.* 6. 42. after the Sheriff is removed, or dead, *&c.* 37 *H.* 6. 12. 3 *H.* 7. 14. 12 *H.* 7. 19. But no Return is not helped by this Stat.

And it is to be obſerved, That (*i*) thoſe Things which are amendable before the Writ of Error brought, are amendable after the Writ brought; and if the (*k*) inferior Court doth not amend them, the ſuperior Court may amend them.

It is neceſſary now to ſhew two Things, 1. What Things are not amendable by this Act of 8 *H.* 6. 2. How many of them, not remedied by this Act, are remedied by other Stat. As to the 1ſt, This Act of 8 *H.* 6. *c.* 12. nor the Act of 8 *H.* 6. *c.* 15. do not extend to 14 Miſpriſions. 1. They do not extend to Want of an Orig. but to Miſpriſion of the Clerks, as

(*a*) Antea fol. 157. a. Dyer 261. pl. 25. Br. Amendment 27. 1 Rolls 202. Fitz. Amendm. 8. Moor 681.

(*b*) Antea 157. a. Fitz. Amendm. 51. Br. Amendment 71.

(*c*) Palm. 231. B. N. C. 43.

* 23 Hen. 8. Br. Amendment 85. in medio. 24 H. 8. Br. Amendment. 47. in fine.

(*d*) Dyer 105. pl. 16. 1 Rolls 289. 1 Rolls Rep. 16.

(*e*) Dyer 180. pl. 48. 1 Roll. 290. Vide 32 H 8. cap. 30. & 28 Eliz. cap. 14.

(*f*) Dyer 225. pl. 34. 1 Rolls 290.

(*g*) Dyer 230, 231. pl. 58. 1 Roll. 290. 1 Rolls Rep. 305.

(*h*) Fitz. Amendment 48. Br. Amend. 67.

(*i*) 2 Rolls Rep. 253.

(*k*) 2 Rolls Rep. 253.

is aforesaid in an Original. 2. They do not extend to Misprision of (*a*) Form in the Original, either False Latin, or Variance from the Register. 3. They do not extend to a material Variance betwixt the Original and the Count. 4. They do not extend to Insufficient Trial, *scil.* when the Venue is mistaken; but Misprision of the Clerk in the Entry of the (*b*) Verdict shall be amended in another Term, according to the Note found by the Jurors: so was it adjudged in *Rawlin's Case, in the 4th Part of my Reports* 29 & 30 *Eliz.* 52. *b.* 5. They do not extend to a Jury returned by the Coroners, where the Sheriff ought to return it, or *e contra. Vide Bainham's Case, in the 5th Part of my Reports, fol.* 36. *b. Vide* 21 & 22 *Eliz. Dyer* 367. 6. They do not extend to a Trial where no Return is endorsed on the *Venire facias*, (*c*) *Rowland's Case, in the 5th Part of my Reports Mich.* 35 & 36 *Eliz. fol.* 41. *b.* 7. They do not extend to a Trial, where one appears who was not returned on the *Venire facias*. The Countess of *Rutland's Case, in the 5th Part of my Reports, fol.* 42. 8. They do not extend to a Return of the *Venire facias* without the * Name of the Sheriff. 9. They do not extend to a Jeofail, Want of Colour, insufficient Pleading, or to any other Default of the Party, or of his Counsel. 27 *H.* 6. 10. 18 *E.* 4. 3. 20 *E.* 4. 6. 11 *H.* 6. 28. For the Statute extends only to Misprision of Clerks. 10. For the same Reason they do not extend to any Error or Misprision of the Judges in any Term past. 2 *R.* 3. 11. 9 *E.* 4. 3. *Vide* 30 *H.* 6. 1. But Misprision of the Clerk in the Entry of the Judgment of a Thing which is apparent, (*d*) and not of Necessity, is amendable, as the Misprision of the summing of the Arrerages before and pending the Writ of Annuity, shall be amended, 35 *H.* 8. *Dyer* 55. 11. They do not extend to that, where the Justice of *Nisi prius* takes the Verdict *post ipsum diem* in Bank, 1 *Ma. Dyer* 97. & 33 *H.* 6. 25. 12. They do not extend to Want of Warrant of Attorney. 13. This Statute nor the Statute of 32 *H.* 8. *cap.* 30. do not extend to help any of the Imperfections or Misprisions, where a Verdict is given on an Issue joined betwixt the Demandant and the (*e*) Vouchee, or the Tenant and the Vouchee, as it was resolved *Mich.* 1 & 2 *Phil. & Mar. Bendloe.* But if any Error in Law be in the Judgment, as *ideo in misericordia*, for *pro capiatur*, or *e contra*, or the like; that is not amendable in another Term, as it has been oftentimes adjudged. 14. Nor do they extend to an Appeal, nor to Pleas of the Crown, nor to any Proceeding upon them, for they are excepted, nor to the Amendment of any Exigent, to make any one to be outlawed, &c. 20 *H.* 6. 18. 7 *E.* 4. 16. 22 *E.* 4. 7. 38 *H.* 6. 3. 21 *H.* 7. 34. *Vide* 7 *H.* 4. 27. Now Misprisions not remedied, neither by the Statute of 32 *H.* 8. *cap.* 30. nor by the Statute of 18 *El. c.* 14. 1. All the said Misprisions not remedied by the said Statute of 8 *H.* 6. remain yet not remedied by any Law or Statute where no Verdict is given upon Issue joined: As if Judgment

(*a*) 5 Co. 45. a.

16, 17 C. 2. c. 8.

(*b*) Palm. 260. Salk. 53.

(*c*) 5 Co. 41. b. 42. a.

* Palm. 151, 152.

5 Geo. c[illegible]3.

(*d*) 2 Roll. Rep. 353, 354.

(*e*) 11 Co. 6. b. 5 Co. 36. b. 1 Anders. 26. 27. pl. 60. O. Benl. 12. N. Benl. 37. Benl. in Kelw. 207. b. Benl. in Ash. pl. 5. Hob. 281. 21 Jac. cap. 13.

be given upon Confeſſion, Demurrer, *Nihil dicit*, *non ſum informatus*, or otherwiſe than by Verdict of twelve Men upon Iſſue joined. 2. When a Verdict upon Iſſue tried is given, ten Miſpriſions are not remedied by the Statutes of 32 *H.* 8. 18 *Eliz.* or any other Statute, but yet remain not amendable. 1 Material Variance betwixt the Original and the Count, as it is reſolved in *Biſhop's Caſe, in the Fifth Part of my Reports* 57. 2. When the Original or Count wants Subſtance: *Vide Freeman's Caſe Paſch'* 41 *Eliz. in the Fifth Part of my Reports, fol.* 45. 3. Inſufficient Tryal, *ſcil.* when the (*a*) Venue is miſtaken, and Verdict paſſes. 4. When the Return of the Jury is by the Coroner, (*b*) where it ought to be by the Sheriff, or *e converſo*. 5. When the Sheriff doth not put his * Name to the Return of the Jury. 6. Where on the *Venire facias*, &c. no Return is endorſed, altho' Verdict paſſes. 7. When one appears, and is ſworn, and amongſt the others gives Verdict who is not (*c*) returned on the *Venire facias*. 8. In an Appeal, or Plea of the Crown, as Indictments, *&c.* or any Proceeding upon them; for they are excepted in the Acts of 8 *H.* 6. and 18 *Eliz.* and the Statute of 32 *H.* 8. doth not extend to them. 9. Although Verdict on Iſſue tried be given for the Plaintiff, yet if on (*d*) the whole Record it appears to the Court, that the Plaintiff has no Cauſe of Action, he ſhall never have Judgment, and that is not remedied by any Statute, as it has been oftentimes adjudged. 10. An Error in Law by Miſpriſion of the Judges in the Judgment entred in another Term is not amendable by any Statute. If the Plaintiff in an Aſſize recovers, and has not put in any Warrant of Attorney, this Error was not remedied by the Statute of 32 *H.* 8. as appears 20 *Eliz. Dyer* (*e*) 363. for the Words of that Act are, *for lack of any Warrant of Attorney of the Party againſt whom the Iſſue ſhall be tried*: So that when the Verdict paſſes for the Plaintiff, the Lack of Warrant of Attorney for the Plaintiff is not aided by that Statute, nor *e contra*, but it is helped by the Statute of (*f*) 18 *Eliz.* for there the Words are general, *for Want of any Warrant of Attorney*, ſo that theſe Words extend as well to lack of Warrant of Attorney of the Party for whom as againſt whom the Verdict paſſes.

(*a*) 21 Jac. c. 13. Hob. 77.
(*b*) 5 Co. 36. b.
* Palm. 151, 152.
(*c*) Cr. Car. 278, 279. 1 Jones 302.
(*d*) Antea 120. b. 133. b. 3 Co. 52 b. Wing. Max. 240.
(*e*) Dyer 363. pl. 23. Budg 73. 1 Rolls Rep. 305. 2 Bulſtr. 245.
(*f*) 18 Eliz. cap. 14.

Cases in the Court of Wards.

Trin. 7 Jacobi Regis.

MYGHT's *Case.*

IN *Curia Wardorum hoc Termino*, It was resolved by the two Chief Justices, and the Chief Baron, and by the Court of Wards, That where *Jeffery Myght* with his own proper Money purchased 12 Acres of Land, late *Lumners* to him and *Simon Mond*, an Infant, to them and their Heirs, held of Queen *Eliz.* by Knights-service; That this original Purchase could not be averred to be by Collusion, to take away the Wardship which might accrue after the Death of *Jeffery Myght*, because the said *Jeffery* was never sole Tenant to the King, nor by the Death of *Jeffery* in Respect of the Survivor, by Force of Jointenancy, any Wardship or primer Seisin could accrue to the King. 2. It was resolved, That no Feoffment which *Jeffery* could make of his Moiety could be averred to be by Collusion, to take away the Wardship or Primer Seisin due by his Death; for if no Feoffment was made, no Benefit could accrue to the Q. by his Death. Also he is out of the Stat. of (*a*) 32 and 34 *H.* 8. for the Stat. of 34 *H.* 8. which is a Stat. of (*b*) Explanation speaks only of a (*c*) sole Seisin in Fee; for the Words are, *having a sole Estate or Interest in Fee-simple*, &c. 3. It was resolved, That when the Father makes a Feoffment for the Advancement of his Wife, Preferment of his Children, or Paym. of his

Godb. 293. 6 Co. 76. a. Co. Lit. 78. a. 76. a. b. 2 Rolls Rep. 303.

(*a*) 32 H. 8. c. 1, 34 H. 8. cap. 5.
(*b*) 3 Co. 31. a. Cr. Car. 34.
(*c*) Cr. Car 33, 34.

his Debts, that that can't be averred to be upon Covin or Colluſion, to give Cauſe to the Queen to ſeiſe all the Land; for the Statute of 32 gives Power to the Tenant to diſpoſe two Parts to ſuch Uſes; and the Statute of 34 *H.* 8. explains, That if all be diſpoſed, it ſhall be good for two Parts; and ſo upon the Conſideration of both the Statutes, no Averment can be of any Covin in ſuch Caſes, for the Clauſe of 34 *H.* 8. concerning Covin is: *If any Perſon, &c. having Eſtate of Inheritance, of or in any Lands, &c. holden of the King by Knights-ſervice in chief, or otherwiſe of the King by Knights-ſervice, hereafter ſhall give, will, deviſe, or aſſign, by Will, or other Act executed in his Life, his Manors, &c. by Fraud or Covin to any Perſon for Years, Life, or Lives, with one Remainder over in Fee, or with divers Remainders over for Term of Years, Life, or in Tail, with a Remainder over in Fee-ſimple, &c. or ſhall convey or make by Fraud or Covin, contrary to the true Meaning of this Act, any Eſtates, Conditions, Meſnalties, Tenures, or Conveyances, to the Intent to defraud or deceive the King of his Prerogative, Primer ſeiſin, &c. which ſhould or ought to accrue or grow, &c. by or after the Deceaſe of his or their Tenant by Force, and according to the former Statute, and of this preſent Act and Declaration, and the ſame Eſtates, and other Conveyances, being found by Office to be ſo made and contrived by Covin, Fraud and Deceit, as is aboveſaid, contrary to the true Meaning of the ſaid former Act, and of this Act, that then the King ſhall have as well the Wardſhip of the Body, and Cuſtody of the Lands, &c. as Livery, primer Seiſin, &c. which ſhould or ought to appertain to the King, according to the true Intent and Meaning of the ſaid former Act, and of this preſent Act, as though no ſuch Eſtates or Conveyances by Covin had never been had or made.* So that this Branch oftentimes refers this Clauſe of Covin to be contrary to the true Intent and Meaning of the former Act, and of this Act: And therefore it is firſt to be known, what is the true Intent and Meaning of the Act of 32 *H.* 8. And that appears by the Words thereof, *ſcil. That all and ſingular Perſon and Perſons having, &c. ſhall have full Power and Authority, to give, diſpoſe, will, or aſſign, by his laſt Will in Writing, or otherwiſe, by any Act or Acts lawfully executed, two Parts, &c. to or for the Advancement of his Wife, Preferment of his Children, and Payment of his Debts, or otherwiſe, at his Will and Pleaſure.* And the Words of the Statute of 34 *Hen.* 8. *ſhall have full and free Liberty, Power and Authority to give, diſpoſe, will, or aſſign to any Perſon or Perſons, &c. two Parts, &c.* Upon which Acts being conſidered together in all their Parts, it was reſolved by the two Chief Juſtices, and the Chief Baron, and the Court of Wards, That in all Caſes when the King's Tenant conveys his Land for

Co. Lit. 78. a. 10 Co. 83. a. 2 Inſt. 110.

Life, Years, or in Tail to his Children, or when a Stranger was joined with the Heir in Estate, or when a Remainder was limitted in Fee, or when an Estate was declared by Will (all which Cases were out of the Stat. of *Marlbridge*, and in which Cases no Collusion could have been averred, as appears by Sir *George Curson*'s Case, in the 6th Part of my *Reports*, and by our Books there cited) that in all such Cases, now by the express Letter of the Clause of 34 *H.* 8. concerning Covin and Collusion, Covin may be averred for the King but only for a third Part, and not for the two Parts, for both the Acts have enable the King's Tenants to dispose of two Parts at their Wills and Pleasures, as appears by the expres Letter of both the Acts; and therefore where no Covin could have been alledged for the King in the Cases aforesaid, before this Act, now Covin may be alledged for the third Part only, and thereof the Act of 32 *H.* 8. puts Examples, *&c.* That he may convey two Parts for the Advancement of his Wife, Preferment of his Children, and Payment of his Debts (against which no Collusion could be averred at the Common Law) and concludes with general Words, *or otherwise at his Will and Pleasure:* And it was objected, That in Case where the King may take Advantage of Collusion apparent, or averrable within the Statute of *Marlbridge*, *c.* 6. *de his qui primogenitos & haredes infra ætatem existentes feoffare solent*, &c. *&c.* to advance only his Son and Heir of an Estate in Fee-simple, if such Covin be found by Office, the King shall take Benefit thereof. To which it was answered and resolved, That by the Express Letter of 32 *H.* 8. which enables the Tenant to convey two Parts for the Preferment of his Children, the Queen shall have but the third Part in such Case, for the said Branch of 32 *H.* 8. concludes, *any Law, Statute, Custom, or other Thing to the contrary notwithstanding.* And so the Statute gives in many Cases remedy to the King, where he had not any before; and in some Case more Benefit to the Subject than he had before. And the Case of *Myght* as to this Point was such, That *Jeffery Myght* being seised of divers Lands and Tenements in the County of *Norfolk*, in Fee, some of them held of Queen *Elizabeth in Capite*, made Feoffments of divers Parts of them to divers particular Uses, to his Brother and others of his Blood, to some of them for Life, and to some for Years, the Remainder to *Tho. Myght* his Son and Heir apparent in Tail, the Remainder to *Jeffery* his younger Son in Tail, the Remainder to *Anne* his Daughter in Tail, the Remainder to *Ed. Money* in Tail, the Remainder to *Jeffery* his Son in Tail, with several Remainders over in Tail, the Remainder to *Thomas Myght* in Fee. And it was found by Office after the Death of *Jeffery*, that all the said Estates and Feoffments were made by Fraud and Covin, to deceive

and

6 Co. 76. a. Co. Lit. 78. a.

Co. Lit. 78. a.

2 Co. 94. a. 2 Inst. 109, 110.

and defraud the late Queen of her Prerogative, Ward and Marriage, and that *Thomas* was within the Age of 21 Years, and afterwards accompliſhed his Age of 21 Years, and before Livery *Thomas* the Son died without Iſſue; after whoſe Death another Office was found, *Anno tertio Jacobi*, with all the ſpecial Matter, and Queen *Eliz.* granted the Ward and Marriage of *Thomas* the Son, to *R. Chamberlain*, &c. and that *Thomas* the Son, after his full Age, died without Iſſue of his Body, before any Livery proſecuted, and that *Jeffery* the Son is his Brother and Heir, and within Age, and alſo next Heir to the ſaid *Jeffery* the Father. And it was reſolved by the Court of Wards, in the Time of Queen *Eliz.* That altho' the Covin was found by Office, that yet the Queen ſhould have but a third Part of the Profits, and not the whole, for the Cauſes and Reaſons aforeſaid, and accordingly the Queen had but the third Part of the Profits, which concurs with the Reſolution before. It was alſo reſolved by the Juſtices, That after the Death of *Thomas* without Iſſue, *Jeffery* ſhould not be in Ward, for the Covin could not extend to *Jeffery* as Heir to *Jeffery* the Father, for at the Time of the Feoffment he was the youngeſt Son, and the Remainder was limited to him to take Effect after the Death of *Thomas* the eldeſt Son without Iſſue, and the Queen had once taken Advantage of the Statute after the Death of *Jeffery*, and after the Death of *Thomas* the Son, he could not be in Ward; for *Jeffery* the Son claimed by force of a Remainder, and *Thomas* had nothing but in Tail, and he is dead without Iſſue. And it was alſo reſolved by the ſaid Juſtices, That if the King's Tenant leave a third Part to the King, that no Covin or Colluſion can be averred for the two Parts, for the Letter and Intent of both the Acts was, that the King ſhould be ſatisfied with the third Part; and therewith agrees *Dyer* 10 *Eliz.* in the Lord *Dacres* Caſe, where it is ſaid, That this is the very Meaning of both Statutes joined together.

Co. Lit. 78. a.
2 Co. 93. b.
10 Co. 80. b.
Dyer 378. pl. 74.

Dyer 276. pl. 50.

Mich.

Mich. 8 Jacobi *Regis.*

DIGBY's *Case.*

SIR *Everard Digby* ſeiſed in Fee of the Manor of *Stoke* in the County of *Rutland*, and of the Manor of *Tilton* in the County of *Leiceſter*, held (by way of Admittance) of the King by Knights-ſervice *in Capite*, by Act executed in his Life-time, and before any Treaſon by him committed, convey'd the ſaid Manors to the Uſe of himſelf for Life, and afterwards to the Uſe of his Eldeſt Son and Heir apparent in Tail, with divers Remainders over to his other Iſſues; and afterwards the ſaid Sir *Ev. Digby* was attainted and executed for the Heinous and Horrible (*a*) Powder Treaſon, committed after the ſaid Conveyance, his eldeſt Son being then within Age. The Queſtion was, Whether the Wardſhip of the Body, or of the third Part of the ſaid Manors ſhould be to the King, by Force of the Statutes of 32 & 34 *H.* 8. And it was reſolved by the two Chief Juſtices, the Chief Baron, and the whole Court of Wards, That the King ſhall never have (*b*) Wardſhip or Primer-ſeiſin, but where there is an Heir general or ſpecial. For the ſaid Statutes of (*c*) 32 & 34 *H.* 8. give Wardſhip or Primer-ſeiſin to the King in divers Caſes where there is no Deſcent; as if the King's Tenant conveys his Land for the Advancement of his Wife, Preferment of his Children, or Payment of his Debts; but doth not give Wardſhip or Primer-ſeiſin in any Caſe where there is not any Heir general or ſpecial; becauſe Wardſhip or Primer-ſeiſin ought to be of the Land of ſome Anceſtor who has an Heir. And the Words of the Writ of *Diem clauſit extremum*, or *Mandamus*, as well after as before the ſaid Statutes are, *Et quis propinquior Hæres ejus ſit.* Alſo Livery ought to be ſued in the Name of the Heir: But it was agreed, that in ſome Caſe the King ſhall have Wardſhip, or Primer-ſeiſin

(*a*) Baker's Chron. 433. Wilſon's Hiſt. 29.

(*b*) 10 Co. 85. a.

(*c*) 32 H. 8. c. 1. 34 H. 8. cap. 5. Co. Lit. 78. a.

Co. Lit. fol. 78. a. 10 Co. 85. a.

F. N. B. 251, 252. k. 353. b. Dy. 155. pl. 22.

seisin of the Son, altho' the Father be attainted of Treason; and thereby the Blood corrupt. And therefore, if (*a*) Tenant in Tail of the King's Gift, to hold by Knights-service *in Capite*, had been attainted of Treason before the Stat. of (*b*) 26 *H.* 8. and died, his Son within Age, in that Case, altho' the Blood is corrupt, yet, because by force of the Statute *de Donis conditionalibus*, the Land notwithstanding such Attainder descends to the Son, he shall be in Ward to the King, because he is a special Heir in such Case, and that is proved by the Book of 7 *H.* 4. 32. *a. b.* where the Case was, King *R.* 2. by his Letters Patents granted divers Manors, *&c.* to *Thomas Holland* Earl of *Kent*, to have and to hold to him and the Heirs of his Body; and afterwards the Earl, 1 *H.* 4. made an Insurrection, and levied War against the King, and, committing the said Treason, was killed without Judgment, his Son *Ed.* within Age; after whose Death the said *Thomas* Earl of *Kent* was attainted by Parliament of High Treason: And farther it was ordained, That all his Lands in Fee-simple, and no other should be forfeited; By reason of which Act of Parliament the King seised the said Manors, and they were in the King's Hands during the Nonage of *Ed.* the Son, and afterwards the said *Ed.* at his full Age, sued out of the Chancery a Writ of *Mandamus*, by which the said Gift and Tenure, and that the said *Ed.* was Heir *per formam doni* was found; and thereupon the said *Ed.* came into the Chancery, and prayed to have Livery: And there it was resolved by *Norton*, *Tremain*, *Hulls*, *Hankford* and *Thirning*, That in such Case the Son shall be in Ward, and altho' the King seised as for Forfeiture of Treason, yet when the King is in Possession, the Law will adjudge him in by reason of Wardship, because that is his best Right; for the Law more respects a small Estate during the Minority of the Issue by right, than a great Estate in Fee-simple by wrong. But there *Markham* held, That when the King seises any Land by Forfeiture of Treason, or other Cause claiming Fee, altho' one who claims a Right in the Land comes into the Chancery, and prays a *Mandamus*, those of the Chancery shall not grant it: And *Gascoign* said, That all the Matter in this Case is, If the Writ of *Mandamus* issued well out of the Chancery, or not; and all this appears by the said Book. And it was agreed, That if there be (*c*) Grand-father, Father and Son, and the Grand-father is Tenant in Tail, and the Father is attainted of High Treason, and dies, and afterwards the Grand-father dies seised, altho' the Blood be corrupt, yet the Land shall descend to the Son *per formam doni*, and this Descent shall toll an Entry, for the Son is in by Descent.

(*a*) 2 Roll. 38.

(*b*) Co. Lit. 392. b. 3 Inst. 19. 4 Inst. 42. 1 Co. 22. a. 7 Co. 33. a. 34. b. 9 Co. 140. a. 12 Co. 6. 3 Co. 10. b. 26 H. 8. c. 13. 1 Leon. 21. 1 Roll. Rep. 162. 2 Roll. Rep. 314, 315, 318, 319, 320, 321, 323, 324, 325, 340, 374, 416, 418, 420, 501, 503, 507, 508. 1 Jones 70, 71, 75, 76, 77, 80. Cro. Car. 428. 2 And. 34. Palm. 439. Hetl. 151, 157. Godb. 300, 303, 307, 308, 309, 311, 313, 315, 321, 322, 323, 324. Co. Lit. 372. b. Plowd. 552. b. Hob. 334, 339, 340, 341, 343, 344, 346, 347, 348. Dyer 332. pl. 27. 343. pl. 46. Co. Ent. 422. a.

(*c*) 3 Co. 10. b. Godb. 315, 316. 2 Roll. Rep. 321, 325, 418, 428, 496, 504, 508. 2 And. 34. Hob. 343. Cro. El. 28. 1 Jones 82. 1 Sid. 199.

Mich.

Mich. 7 Jacobi Regis.

The Earl of CUMBERLAND's *Case.*

Lane 39, 40, 41. IN the great Case of the Earl of *Cumberland*, heard in the Court of Wards this Term, before the Earl of *Salisbury* Master of the Wards and Liveries, with the Assistance of the two Chief Justices and Chief Baron, for the Castle and Manor of *Skipton* in *Craven*, &c. in the County of *York*: It was held by the two Chief Justices and Chief Baron, That where King *E.* 2. by his Letters Patents had granted the said Castle and Manor of *Skipton* in *Craven*, &c. to *Robert de Clifford* in Tail, King *H.* 6. *concessit* (as it was found by Office) *Tho. Domino Clifford* (Cousin and Heir of the Body of the said *Robert de Clifford*) *reversion' prad' Castri & Manerii de Skipton in Craven*, &c. *cum suis pertin' necnon Castrum & Manerium prad'*, that admitting that the said Grant in Tail to the said *Robert de Clifford* was void (which was only put by way of Admittance, without prejudice to any of the Parties) that yet the said Castle and Manor did pass by the later Grant to *Thomas* Lord *Clifford* in Fee-simple in Possession. For the Intent of King *H.* 6. was, that be it in Possession or Reversion, it should pass, and his Words agree with his Intent; for first, he grants the Reversion, if the first Estate Tail was good; and if the Estate Tail was not good, then he farther grants the said Manor in Possession, and so his Words in his Letters Patents agree with his Intention, and both agree with the Law. As many Leases made by the King, and other his Progenitors before him, to one to begin after the Determination of such a Lease, if the Lease be good, and if the Lease be not good, from such a Feast, and such Leases are good. Note Reader, As to

Lane 39, 40.

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the Recital of an Eſtate Tail, or Leaſe for Life or Years, by theſe Words, *mentionatur fore concedi*, or *dimitti*, &c. it was but of late, (and yet of good) Invention, but the antient Form was to recite the firſt Grant, and to grant the Reverſion, and farther to grant the Lands in Poſſeſſion, and theſe ſeveral Grants in (a) a Patent are as good and ſtrong in Law as if the King by a Patent had recited the Eſtate Tail, and granted the Reverſion, and by another Patent had granted the Land in Poſſeſſion; without Queſtion the one or the other will be good; ſo is it when the ſeveral Grants are contained in one and the ſame Patent; for (b) *fruſtra fit per plura, quod fieri poteſt per pauciora.* And the Opinion of (c) *Huſſey C. J.* in 9 *H.* 7. 2. *a. b.* is good Law, if it be well underſtood, for *non in legendo, ſed in intelligendo leges conſiſtunt.* For where he ſaith, It is clear, if the King intending to ratify and confirm a Grant made by his Predeceſſor of a Franchiſe by his Letters Patents, and he ratifies and confirms the Eſtate, and farther adds this Clauſe, *Damus & Concedimus*; this is but a void Grant, which ought to be thus intended, that for fear of a Forfeiture of the Franchiſe, the Patentee took a Confirmation of the Succeſſor K. which is ſufficient (before Office found of the Forfeiture) to diſcharge the Patentee of any Forfeiture; and therefore he well ſaid, that the ſubſequent Words, *Damus & concedimus*, are but void; for the King in ſuch Caſe has not any Eſtate grantable in Law before Office found, and therefore of Neceſſity it ought to take Effect by way of Confirmation, and can't enure by way of Grant, and all this appears by *Huſſey*'s Reaſon expreſſed in the ſaid Book, why *Damus & concedimus* in ſuch Caſe are void: for (as he ſaith) it ſhall not paſs by this Confirmation and by Grant, then it ſhall enure by way of Confirmation, and not by way of Grant, *Vide* 11 *E.* 4. 1 *b.* 7 *H.* 7. 14. *a. b. Plow. Com.* 397. But in the Caſe at Bar there is not any Confirmation which preſuppoſes that the King has but a Title or Right not grantable, but both Eſtates as well of the Reverſion as of the Poſſeſſion are grantable Eſtates, and ſo not like the ſaid Caſe put by *Huſſey*. And when the King's Charter may be taken to (d) two Intents, and both Intents are of Effect and good, in many Caſes it ſhall be taken to ſuch Intent which is moſt beneficial for the King, but if it may be taken to one (e) Intent of Effect and good, and to another Intent void and of none Effect, it ſhall be taken and conſtrued according to ſuch Intent, that the King's Grant ſhall take Effect, and which in Judgment of Law ſtands with the King's Intent, for it was not the King's Intent to make a void Grant, and therewith agrees the Book in (f) 21 *E.* 4. 44. in the Abbot of *Waltham*'s Caſe: the Reaſon and Rule of which

(a) Cart. 140.

(b) 9 Co. 95. b. Co. Lit. 362. b. 3 Bulſtr. 170. Noy. 164. 1 Roll. Rep. 85. Hard. 113.

(c) Plowd. 397. b.

(d) 1 Co. 45. a. 8 Co. 56. a. 10 Co. 67. b. 11 Co. 11. a. b. Bulſtr. 6. Keiw. 175. a. 198. a. 2 Sid. 141. 3 Leon. 243. 2 Roll. 203. 2 R. 3. 4. a. b.

(e) Antea 56. a. 6 Co. 56. a. 11 Co. 11. a. b.

(f) 1 Co. 45. a. 8 Co. 56. a. 11 Co. 11. b. 3 Keb. 234. Dyer 269. pl. 19. Br. Patent, 71, 90. Br. Exemption 9. Br. Expoſition 38. Plowd. 32. a. 126. a. 143. b. 331. b. Fitz. Grant 29. Moor. 165. Hard. 500. 2 Roll. Rep. 275. 2 Sid. 82.

Book over-rule the Case now in Question: *scil.* either to make the Grant good, either of the Reversion, if the former Grant in Tail was good, or of the Possession, if the former Grant was void, or if no Grant was made *omnino*, but not to make the King's Grant utterly void, as well of the Reversion as of the Possession, when the King has either the Reversion or the Possession in him. So it was held, If the King grants *totum illud Manerium sive firmam de D.* or *totam illam Rectoriam sive Advocationem de D.* that if the King has a Manor or Farm, and no Manor, or a Rectory Impropriate or Advowson, and no Rectory, that which the King has shall pass; for the Effect of the Grant is, be it Manor or Farm, Rectory impropriate or Advowson, that which the King in Truth has, shall pass.

Hill.

Hill. 7 Jacobi Regis.

PARIS STOUGHTER's *Case.*

Paris Stoughter was seised of the Manor of *Over-stoughter* in the County of *Glouceſter*, to him and the Heirs Males of his Body, and had Iſſue *Chambers Stoughter*, and died: By Writ of *Mandamus*, *Anno* 2 *Jac'* it was found, That the ſaid *Paris* was ſeiſed of the ſaid Manor, as is aforeſaid, and died ſeiſed the 22d *Febr'* *Anno* 40 *Eliz.* and that *Chambers* was his Son and Heir; and that the ſaid Manor was held at the Time of the Death of the ſaid *Paris* of Queen *Eliz.* as of her Manor of *Nether-hall* in the ſaid County, by Fealty and Rent, in free and common Soccage, *&c. Trin'* 7 *Jacobi* a *Melius inquirendum* was awarded, reciting the former Office to enquire only of this Point, whether the ſaid Manor of *Over-ſtoughter* at the Time of the Death of the ſaid *Paris* was held of our Sovereign Lord the King *in Capite* by Knights-ſervice, or otherwiſe by Knights-ſervice. By virtue of which Writ it was found, that the ſaid Manor was held, at the Time of the Death of the ſaid *Paris*, of the late Queen *Elizabeth* by Knights-ſervice, as of her Manor of *Nether-ſtoughter*, and that at the Time of the taking of the ſame Inquiſition, the ſaid Manor of *Over-ſtoughter* was held of the King which now is, by Knights-ſervice, as of his ſaid Manor of *Nether-hall*. And it was clearly reſolved by the two Chief Juſtices and the Chief Baron, That the ſaid Writ of *Melius inquirendum* was repugnant in itſelf, and gave not Authority Cro. 34.

rity to find such Office as was found. For the said *Paris* died 40 *Eliz.* and the Writ of *Melius inquirendum* was to enquire whether at the Time of the Death of the said *Paris* the said Manor of *O.* was held of our Lord the King which now is, which was impossible and repugnant, that in *an.* 40 *Eliz.* the said Manor of *O.* should be held of our Lord the K. who then was King only of *Scotland*, and not of *England*. And altho' the finding was well, yet forasmuch as it was without the Warrant of the Writ, all was insufficient and void, and a new Writ of *Melius inquirendum* ought to be awarded. *Vide F. N. B.* 255. *D.* that a *Melius inquirendum* shall be awarded on a surmise in Court that the Lands are of greater (*a*) yearly Value than is declared in the Office, and by the like Reason on a Surmise that they are held by other Services; or that he is seised of another Estate than is recited in the Office. But it was resolved, That if on the Writ of *Melius inquirendum* in these Cases it be again found against the K. the K. shall not have a new Writ of *Melius inquirendum*, and that for three Reasons; 1. Because then there would be no End thereof; but such Writs would issue infinitely, & * *infinitum in jure reprobatur*. 2. As if a Writ of *Diem clausit extremum*, or *Mandamus*, &c. is found against the King, there shall not be a new Writ of *Diem clausit extremum*, or *Mandamus* awarded; so if upon the *Melius* it be found against the King, no *Melius* shall be farther awarded. *Vide* 12 *Eliz. Dyer* (*b*) 292. the *Melius* is in the Nature of the first Writ of *Diem clausit extremum*. 3. If Office be found for the King, the Party grieved may traverse it, and if the Traverse be found against him, it makes an End of the Business. So if it be found for him who tenders the Traverse, it shall bind the King as to this Matter. And so when the first Office is found against the King, and the *Melius inquirendum* also, the King thereby is bound from having another *Melius inquirendum* for the same Matter, for the Comparative Degree is above the Positive, and the Superlative above the Comparative, and not Comparative upon Comparative, no more than Superlative upon Superlative. But if upon the *Melius inquirendum* it be found for the King, yet the Party grieved may traverse it: And it stands with Reason, That when Office is found for the King, that forasmuch as the Party grieved is not concluded by it, but may traverse it; so when it is found against the King, forasmuch as the King can't traverse it, that he should have a Writ of *Melius inquirendum*, and yet the *Register* has not any Writ in such Case. Note Reader, It appears by the Statute of (*c*) *Lincoln*, made 29 *E.* 1. that at the Common Law, the Escheators used to seise the Lands of the King's Tenant before Office; and therefore it is enacted

(*a*) Dyer 155. pl. 22. F. N. B. 255. b. d. 13 Co. 70.

* 6 Co. 45. 2. 7 Co. 44. b. 12 Co. 24. 2 Inst. 340. 2 Bulstr. 99. Hob. 159.

(*b*) Co. Lit. 77. b. Dyer 292. pl. 71.

(*c*) Ley. 28. 2 Inst. 206, 689. 28 H. 6. 9. b. Standf. Prær. 81, 82.

enacted by the Statute, That when Inquisitions are found by Writ before Escheators, *quod nihil tenetur de ipso Dom' Rege*, &c. *quod statim absque dilatione mandetur per breve Dom' Reg' de Cancell' præcipiend' quod Escheatores de terris & tenementis sic in manus Dom' Regis per ipsos capt' manus suas amoveant omnino*, &c. *salvo semper Domino Regi quod si postea Escheatores suas manus amoverint per breve ipsius Domini Regis, ut præd' est, aliquid contigerit inveniri in Cancellaria vel ad Scaccarium, vel alibi in Cur' ipsius Dom' Regis per quod custodia terrarum aut tenementorum eorundem, de quibus Escheatores manus suas amoverint in forma præd' Dom' Regi pertineat, quod statim præmuniatur ille per breve de Cancellaria*, &c. And this Act doth not make against the said Resolution, for two Reasons. 1. It is a Rule in Law, and affirmed by this Act, that where the King's Hands are once removed by Matter of Record, there for any Title ancienter than the Amover, the King shall not reseise upon any new Office found without a *Scire facias*; and that appears in (*a*) 28 *H.* 6. 9. *b.* (*b*) 9 *E.* 4. 51. *b. Vide* 5 *H.* 5. 2. *a.* But in the Case at Bar there was never any Seisure into the King's Hands, and by Consequence there could be no *amoveas manus*, and therefore this Case is clearly out of that Statute. 2. At this Day the Escheator (*c*) before Office found can't seise any Lands into the King's Hands, but the Seisure ought to be after Office found, and that appears by the Statute of *W.* 1. *cap.* 24. *Vide* 5 *E.* 6. *Br. Office* 55. and many other Books, and so is the common Experience at this Day; and therefore the Case at Bar is out of the said Statute. And true it is, that after *Diem clausit extremum*, or *Mandamus*, &c. awarded and found against the King, no new Writ of *Diem clausit extremum*, or *Mandamus* shall issue, as it is held in (*d*) 4 *Hen.* 7. 15. *b.* & 16. *a.* 14 *Ed.* 4. 5. *a.* 15 *Ed.* 4. 11. 8 *Eliz. Dyer* (*e*) 248, & 249. But in such Case a Writ of *Melius inquirendum* shall issue, as is aforesaid, and as the common Course in the Court of Wards is, and always has been: and with this Difference all the Books are well reconciled, and agreed *& sic interpretare & concordare Leges Legibus est optimus interpretandi modus*. But in good Discretion no *melius inquirendum* shall be awarded after Office found against he King, without Sight of some Record, or other pregnant Matter for the King, for avoiding of Vexation of the Subject. *Vide* 12 *Eliz. Dyer* (*f*) 292. It is found by Office, on a *Diem clausit extremum*, that the Land was held *de Domina Regina, sed per quæ servitia Juratores ignorant*, whereupon a *Melius inquirendum* was awarded, by which the Tenure was found of a Subject, and all other Points certainly found, by that the first Office is void in all *per Sensum Statuti de* 2 *E.* 6. (*g*) *c.* 8. And all these Resolutions were affirm'd for good Law,

(*a*) Br. Scire facias 9. Br. Reseiser 1.
(*b*) Br. Scire fac. 135. Stanf. præ. 82. b.
(*c*) 2 Inst. 206, 573. Plowd. 486. a. Br. Office, &c. 55.
(*d*) Br. Office &c. 33.
(*e*) 2 Inst. 572. Dyer 248, 249. pl. 81, 82.
(*f*) Hob. 501 Dyer 292. pl. 71. Co. Lit. 77. b.
(*g*) 2 Inst. 688, 689.

Mich. 8 *Jac.* by the ſaid Chief Juſtices and Chief Baron in *Stephen* (*a*) *Garner's* Caſe *in Curia Wardorum*, for Lands in *Furſeby* and *Steeping* in the County of *Lincoln*, as to the ſaid Writs of *Melius inquirendum* where it was found by the firſt Office, that the Lands were held of *Euſtace Hart* Eſq; and his Wife, as in the Right of his Wife of their Manor of *Steeping*: and upon the *Melius* it was found that the ſaid Lands were held of Sir *Ed. Carre* Knight, as of his Manor of *Monkthorp*, and notwithſtanding this Variance of the Offices, yet it was reſolved *ut ſupra*, That no new Writ of *Melius* ſhould iſſue, for the Reaſons and Cauſes before alledged.

(*a*) Ley 27, 28.

Paſchæ

Paſch. 8 Jacobi Regis.

TOURSON's *Caſe.*

William Tourſon, an Idiot *a Nativitate*, by Force of a Remainder after the Death of his Father, was jointly ſeiſed with his elder Brother for Term of their Lives, the Leſſor purchaſed the Eſtate of the elder Brother, and took the Body of the Ideot, and all the Profits of the Land, and afterwards *William Tourſon* was found an Ideot *a Nativitate* by Inquiſition; The Queſtion was, Whether the King ſhou'd have the mean Profits of the Moiety from the Time of the firſt Seiſin of the Ideot, or from the Time of the Office; and it was reſolved, that the King ſhould not have the Profits, but after the Office: and yet to ſome Intent the Office ſhall have Relation from the Time of the Birth, *ſcil.* to avoid all mean Acts done by the Ideot; and therewith agree *F. N. B.* 202. *e.* and (*a*) 18 *E.* 3. *ſcire fac.* 10. 32 *E.* 3. *Scire fac.* 106. 50 *Aſſ. p.* 2. *&c. vide Beverley's Caſe, in* 4 *Part of my Reports* 124, 125. But for the mean Profits, it ſhall not have Relation, but from the Time of the Office found; for thereby it appears of Record, that the King has Right to ſeiſe the Lands, as if the King's Tenant commits Felony, *An.* 1 *Jac.* and afterwards *Anno* 3. he is attainted for the ſame Felony, and afterwards *Anno* 4. all is found by Office; Now this Office ſhall have Relation to the Time of the Felony to avoid all mean Alienations and Incumbrances; but for the mean Profits, it ſhall have Relation to the Time of the Attainder, for then the K's Title appeared of Record; and therewith agree *Plow' Com'* 488. & 38 *E.* 3. 31, 32. by *Kirton. Vide* 29 *H.* 8. *Br. Chart' de Pardon* 52. and there is a Difference when the K. ſhall have the Cuſtody, by Reaſon of a Seigniory, as in Caſe of Wardſhip, there the King after Office found ſhall have the mean Profits from the Time of the Death of the Anceſtor, for there the King has the Cuſtody

(*a*) 4 Co. 126. b. Co. Lit. 247. a. Stand. Præ. 33. b. 34, 35. 2 Inſt. 14.

Co. Lit. 390. b. 391. Poſtea 171. b.

dy, by Reaſon of his Seigniory, and he loſes his Rent and Services in the mean Time. But the King has the Cuſtody of an Ideot not in Reſpect of any Seigniory, but *Jure Protectionis ſuæ regiæ*, becauſe his Subject is not able to govern himſelf, nor the Lands or Tenements which he has; and this Protection begins by the Office found. And the Statute *de Prærogativa Regis*, *cap.* 9. ſaith, *quod Rex habebit Cuſtodiam terrarum fatuorum, capiendo Exitus, &c. & inveniet eis Neceſſaria ſua, &c.* by which it appears that the King ſhall take the Profits from the Time that he is charged with the finding of the Ideot, and his Family Neceſſaries, and that is after the Office found; ſo that when the King ſeiſes *Jure Protectionis regiæ*, as in the Caſe at Bar, or *nomine diſtrictionis*, as in Caſe of Alienation of Land *in Capite* without Licence, or of Marriage of his Widow without Licence, there, after Office found, the King ſhall not have any mean Profits before the Office, as it is held in 8 *E.* 4. 4. 40 *Aſſ. p.* 36. But when the King ſeiſes *Ratione prioris Recti ſeu Tituli*, by Reaſon of a former Right or Title, there the K. ſhall have the mean Profits from the Time of his Right or Title firſt accrued, as 18 *Aſſ. p.* 18. from the Time of the Condition broke, 41 *E.* 3. 21. from the Time of the Alienation of his Tenant in Mortmain; and if the Lands are held of others, from the Time of the Title devolv'd to him, 46 *E.* 3. *Forfeiture* 18. upon the Statute of *Weſtm.* 2. *cap.* 45. which gives the *Contra formam Collationis*, from the Time of the Alienation; for by thoſe Acts the King's Title and Right accrues: *Vide* 35 *E.* 3. *Vill* 22. 40 *Aſſ. p.* 36. 9 *E.* 4. 5. And in the principal Caſe no Precedent can be found, that the King was anſwered the mean Profits before the Office found, but only after the Office, and ſo the *Quære* in *Stamford's Prærogativa Regis*, 34. *b.* is well reſolved.

1 And. 23. Moor 4. Dyer 25, 26. pl. 164.

Stanf. præ. 33. b. 34, &c.

1 Leon. 4. pl. 50. 3 Leon. 175. pl. 226.

Moor 293.

Paſch.

Paſchæ 8 Jacobi Regis.

Sir GERARD FLEETWOOD's *Caſe.*

SIR *William Fleetwood*, *Anno* 35 *Eliz.* was poſſeſſed of an Houſe and certain Lands in *Pynner* in the Pariſh of *Harrow*, in *Harrow* in the County of *Middleſex*, for certain Years yet enduring, and *An.* 36 *El.* he became Receiver General of the Revenue of the Court of Wards, *&c.* and entred into 20 Bonds, each of them of 200 *l.* with Condition to make a Yearly perfect Accompt before the 20th of *June*, &c. and afterwards upon ſeveral Accompts, in the Years 36, 37, 38, & 39 *Eliz.* he became indebted to the Queen in great Sums of Money; and he being ſo indebted, by his Indenture, 10 *Feb.* 40 *Eliz.* in Conſideration of 1100 *l.* bargain'd and ſold the ſaid Leaſe to *James Pemberton*, by Force whereof he entred, and was thereof poſſeſſed; which mean Conveyance, and in Conſideration of 1300 *l.* was ſold to Sir *Gerard Fleetwood*. The Queſtion was, Whether the ſaid Meſſuage and Lands are now extendable, or liable to the King's Debt? And altho' it is at the Election of the Sheriff, either to extend or to ſell a Leaſe, ſo long as it remains in the Debtor's Hands, as appears in the Books of (*a*) 31 *Aſſ. p.* 6. 38 *Aſſ. p.* 4. 44 *E.* 3. 16. 7 *H.* 6. 2. *&c.* yet it was reſolved, That the ſaid Sale of the Term ſhould bind the King, becauſe the Term was but a Chattel, and there was no Covin in the Caſe, and a Sale (*c*) *bona fide* of Chattels is good after Judgment, but not (*d*) after Execution awarded, as appears in 2 *H.* 4. 14. *per Curiam*, 9 *H.* 6. 58. 11 *H.* 4. 7. and of the Freehold or Inheritance which he has at the Time of the (*e*) Judgment in Caſe of a Common Perſon, and from the Time one becomes the King's Debtor, 5 *El. Dyer* 224, 225. Sir *Will.* (*f*) *Cavendiſh*'s Caſe. And the Caſe in (*g*) 50 *Aſſ. p.* 4. was urged to the contrary, where the King's Debtor took a Leaſe to him and his Wife for Years, and before Execution the Huſband died, Execution was ſued againſt the Wife, for it was the Act of the Huſband, and he had Power of the Term at

(*a*) Br. Execut. 84. Br. Aſſiſe 318. Br. Extinguiſhm. 61.
(*b*) Br. Aſſiſe 347.
(*c*) 2 Roll. 157.
(*d*) Cro. Jac. 451. Cro. El. 174, 181, 440. 2 Roll. 157. Cro. Car. 149. 1 Leon 145, 301. Kelw. 87. 2. 29 Car. 2. c. 3. Moor 352, 873. 1 Roll. 893.
(*e*) Cro. Jac. 451, 452. Cr. Car. 149. Kelw. 87. 2. 29 Car. 2. cap. 3.
(*f*) 3 Co. 12. b. 11 Co. 93. 2.
(*g*) pl. 32, 33. Execution 148.

Plowd. 321. a. Godb. 292, 297. 2 Roll. Rep. 300, 302. Hard. 25, 26. Dyer 224, 225. 1 Roll. 346. 2 Roll. 156, 157. Plowd. 261. a. 50 Aſſ. pl. 3. Fitz. Execut. 113. Br.

at the Time of his Death, and the Wife came to it without valuable Conſideration, and *quodammodo* continued the Intereſt of her Huſband. And *Coke*, Chief Juſtice, ſaid, That a Receiver, or other Accomptant who is indebted, ſhall not be in a worſe Caſe than a (*a*) Felon or Traytor, who may, after the Felony or Treaſon, and before Conviction, ſell *bona fide* for his Suſtenance, *&c.* his Chattels, be they Real or Perſonal.

(*a*) Co. Lit. 391. a. Plowd. 68. a. Antea 370. a.

Paſch.

Paſch. 8 Jacobi Regis.

HALE's *Caſe.*

BY Office after the Death of Sir *James Hale*, it is found that he died ſeiſed of divers Lands in the County of *Kent* in Fee-ſimple, whereof Part was held of Queen *Eliz.* by Knight's Service *in capite*, and that *Cheyny Hale* was his Son and Heir, and within the Age of 21 Years, and in Ward to the Queen; and afterwards *Cheyny Hale* accompliſh'd his full Age, as appeared by the Computation of the firſt Office, and ſo he was in Truth, and he tendred his Livery, and was admitted to it, and within the uſual Time given him for the Proſecution of the Livery, by Deed indented and inrolled, he bargained and ſold Part of his ſaid Lands to another in Fee, and died alſo within the ſaid Time. And two Queſtions were moved; 1. If the Livery of the ſaid *Cheyny Hale* be loſt by his Death? 2. Whether the Iſſues and Profits of the Lands ſo aliened, after the Tender of the Livery and Death, are to be anſwered to the King for want of Livery, and for what Time? And it was agreed, That at the Common Law, the King ſhall have Primer Seiſin when the Anceſtor dies, his Heir within Age, and was in Ward, and that the Statute of *Prærogative Regis*, *cap.* 3. is but an Affirmance of the Common Law, *ſcill' Rex habebit primam ſeiſinam, poſt mortem eorum qui de eo tenent in capite de omnib' Terris de quibus, &c. Cujuſcunq; ætatis Hæredes fuerint, cap' Exitus, &c. donec, &c. ceperit homagium hujuſmodi Hæredis.* For when he has been in Ward, he upon his Livery ſhall pay but half a Year's Profit; and when he is of full Age a whole Year's Profit; and that was the Common Law, for no ſuch Diſtinction is made by the ſaid Act. And it appears by the ſaid Act, That Primer Seiſin is, That the King ſhall take the Profits of the Land, *donec ceperit homagium*, which is as much as

1 Leon 154. Lit. Rep. 340.

Lit. Rep. 340. Stanf. Prær. 11. b. 12, &c.

Co. Lit. 77. a.

to

to say, until he has sued Livery, for upon his Livery he doth Homage; so that the King's Interest is subject to this *donec*, which is a Limitation in Law; then when the Heir, at his full Age tenders his Livery, which includes tendring of his Homage, it is all that the Heir can do; and therefore if no Laches be afterwards in the Heir in the Prosecution of his Livery, he shall have as much Advantage by his Tender, as if he had done Homage, and had had his Livery when he made his Tender, and the convenient Time which the Law gives the Heir to prosecute his Livery out of the King's Hands after Tender, is three (*a*) Months, because many Things are requisite and necessary, with great Care and Diligence, to be well and duly pursued in the prosecution thereof, than when the Heir dies within the said Time: So that the doing of his Homage, and suing out of his Livery without Fault in him, is become impossible by the Act of God, (*b*) *impotentia in hoc casu excusat legem*, and in Judgment of Law, (*c*) the King's Interest by the said Limitation is determined, as if the King had taken the Homage of the Heir when he made his Tender. And with this Resolution agree all the Precedents of the Court, and therefore when the Heir renders his Livery, the Court of Wards, for fear of Death, have used to take collateral Assurance for that which is due to the King. But if the Heir, after he comes of full Age, or if he be of full Age at the Time of the Death of his Ancestor, dies without any Tender, the Livery is gone, as is aforesaid. But the King shall have all the mean Profits till the Death, for default of Tender; but the Tender, if it be pursued, or if within the Time it becomes impossible by the Act of God, *sc.* the Death of the Heir, there the King by Law is barred from having the mean Profits, as is aforesaid. *Vide Stamford Prerog.* 12, 13, *&c.* And it was resolved, That in this Case the King's Interest, by the said Limitation and Act in Law, was determined by the Death of the Heir, so that the Barginee might enter and occupy the Land without any *Monstrans de droit*, or *Amoveas manum*, &c.

(*a*) 6 Mod. Lit. Rep. 340.

(*b*) 4 Co. 11. a. 5 Co. 22. a. 6 Co. 21. b. 68. a. 9 Co. 73. a. 10 Co. 139. b. Hard. 367. 1 Co. 98. a. Co. Lit. 29. a.

(*c*) 9 Co. 132. a.

Co. Lit. 77. a. 9 Co. 132. a.

Pasch.

Paſch. 8 Jacobi Regis.

Sir HENRY CONSTABLE's *Caſe.*

SIR *Henry Conſtable* Knight, 15 *Decembris*, *Anno* 5 *Jac.* died ſeiſed of an Eſtate in Fee-ſimple of Lands held of the King by Knights Service in *capite*, *Henry Conſtable* his Son and Heir being within Age, and made a Knight in the Life of his Father, 1 *Julii*, *Anno* 7 *Jac.* *Henry* the Son accompliſh'd his Age of 21 Years. *Henry* the Son tender'd his Livery after the Death of his Father before his Age of 21 Years, and continued it: And the Queſtions were, 1. Whether the Profits of the Lands ſhould be ſaved to him by the ſaid Tender and Continuance? 2. Whether the King ſhould have the Rates within the Age of 21 Years? And both Queſtions were clearly reſolved againſt the King, and that the King ſhould have Primer Seiſin, as if he had been of 21 Years at the Time of the Death of his Father, becauſe the King, being the Soveraign of Knighthood, is adjudged him of full Age to (a) do Knight's Service in the Life of his Father, for the Reaſons reported at large in *Drue Druries Caſe*, *in the Sixth Part of my* Reports, *fol.* 73. which were affirmed for good Law by the Chief Juſtices, and Chief Baron.

(a) Lit. Sect. 103. 6 Co. Lit. 73, 74. b. 75. b. 78. b. Cr. Jac. 156, 389. 13 Co. 34. b. Hob. 46. 91. 6 Co. 74. a. Plowd. 268. a.

Trin. 8 Jacobi Regis.

VIRGIL PARKER's *Case.*

(a) 10 Co. 84. a. b.

Virgil Parker, (a) ſeiſed of the Manor of *Fuſhil* in Fee, held of the King by Knight's Service, as of his Dutchy of *Lancaſter*, *Anno* 27 *Eliz.* made a Feoffment of one half of the ſaid Manor to *John Coxwell*, and others, before Marriage, to the Uſe of himſelf for Life, and afterwards to the Uſe of *Mary Coney*, whom he then intended to marry, for Life, for her Jointure, and afterwards to the Uſe of himſelf in Tail, with divers Remainders over, and afterwards he married the ſaid *Mary*; after which Marriage, *ſc.* 39 *Eliz.* the ſaid *Virgil* leaſed the other half of the ſaid Manor to the ſaid *John Coxwell*, and *Edward Long*, for divers Years, for Payment of his Debts and Legacies, and afterwards made his Will, and thereby deviſed 1000 *l.* in Portions to his younger Children, and died, his Son and Heir within Age. And the Queſtion was, If the King ſhould have the third Part out of the half of the Manor in Leaſe only, or out of the Wives half and this half alſo? And it was reſolved, That foraſmuch as the Advancement of his Wife is as well within the Statute, as (b) Payment of his Debts, and Preferment of his Children, and foraſmuch as the Operation of the Statute principally takes its Effect by the Death of the K's Tenant; for this Reaſon, altho' the Eſtate of the Wife has the Precedency, it was reſolved, That the King's third Part ſhould be taken (c) equally out of both Halves, and not out of the Half ſo leaſed only. And ſo was it reſolved in *Mich.* 41 & 42 *Eliz.* betwixt *Remington* and *Savage*, and 23 *Eliz.* in *Thynne*'s Caſe; and therewith agrees the Common Experience of the Court of Wards.

(b) Co. Lit. 76. b. 78. a.

(c) 10 Co. 84. a. b. 9 Co. 133. b. Moor 745, 746.

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